# Trading rights as a novel category of servitudes in South African law

by

Leigh-Ann Kiewitz

*Dissertation presented in partial fulfilment of the degree of Doctor of Laws*

*in the Faculty of Law at*

*Stellenbosch University*

Promoter: Prof ZT Boggenpoel

December 2019

## Declaration

By submitting this thesis electronically, I declare that the entirety of the work contained therein is my own, original work, that I am the sole author thereof (save to the extent explicitly otherwise stated), that reproduction and publication thereof by Stellenbosch University will not infringe any third party rights and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

L Kiewitz, December 2019, Stellenbosch

## Summary

This dissertation sought to determine whether it is possible to recognise trading rights as a category of servitudes; what its nature and content would be if such recognition is possible; and, under which conditions such servitudes could be registered. South African case law has revealed the courts' willingness to regard the right of an individual to trade on another's land, and a right to prevent another person from trading on their own land, as a praedial or a personal servitude. However, the relevant case law is not equally clear in all instances, especially in terms of whether the requirements of servitude law would be complied with. This dissertation provides a methodology that courts should follow to ensure that the particular right complies with all the requirements.

When the subtraction from the *dominium* test as developed by case law is applied, it is clear that trading rights could amount to real rights because they place a burden on land by means of restricting the owner of the servient tenement's enjoyment in a physical sense. For purposes of positive and negative praedial trading servitudes, the crucial issue for compliance with the *utilitas* requirement is that the dominant tenement must be developed, appointed and used in a way that would render the servitude useful for the dominant land on a durable basis. Negative servitudes in restraint of trade are a contested matter based on the fact that they could stir up anti-competitiveness. However, convincing policy arguments exist for the recognition of such servitudes. Moreover, if negative trading rights can be recognised as real rights, legislation will be necessary to ensure that the rights of the parties benefiting from the servitude and affected thereby are balanced adequately. Accordingly, it is concluded that a legislative framework should be adopted containing conditions under which these negative servitudes in restraint of trade should be registered as limited real rights. If a negative trading right does not comply with the requirements for the establishment of a praedial servitude, it is conceivable that a personal servitude may be established.

In seeking alternatives to structuring trade agreements, a positive right to trade could be established as either a lease agreement or an innominate contract. It has also been discovered that a restraint of trade agreement could alternatively be set up as a restrictive covenant. After having evaluated all the possible legal constructs, it is concluded that it is preferable to secure a positive right to trade by means of a praedial servitude, personal servitude or a registered long-term lease agreement. This is because an individual's rights will certainly be better protected in the form of a limited real right because it is stronger than a personal right as it will be enforceable *erga omnes*. Due to the synonymous content of a restrictive covenant and a negative servitude in restraint of trade, this dissertation shows that a servitude would suffice to secure this negative right. Furthermore, restrictive covenants are precarious in nature and have essentially become redundant in South African law. Therefore, structuring restraint of trade agreements as a servitude would arguably be more suited.

## Opsomming

Hierdie proefskrif het beoog om te bepaal of dit moontlik is om handelsregte te erken as ‘n kategorie van serwitute en indien moontlik, wat die aard en inhoud van sodanige serwitute sal wees en onder welke omstandighede sulke serwitute geregistreer kan word. Suid-Afrikaanse regspraak illustreer die howe se bereidwilligheid om die reg om op iemand anders se grond handel te dryf, en die reg om ‘n ander te verhoed om handel op sy eie grond te bedryf, te erken as ‘n erfdiensbaarheid of persoonlike serwituut. Desnieteenstaande, is die relevante regspraak nie duidelik in alle gevalle nie, veral met betrekking tot die vraag of hierdie regte in ooreenstemming met die vereistes vir die vestiging van ‘n serwituut sal wees, al dan nie. Die proefskrif voorsien ‘n metodologie wat die howe behoort te volg ten einde toe te sien dat die reg wel aan al die vereistes voldoen.

Wanneer die ‘subtraction from the *dominium*’ toets soos ontwikkel deur regspraak toegepas word, illustreer die proefskrif dat dit inderdaad moontlik is dat handelsregte wel as saaklike regte geag kan word indien dit ‘n las op die grond plaas tot die mate waarin dit die eienaar van die grond se bevoegdhede op die dienende grondstuk, fisies beperk. Vir doeleindes van positiewe en negatiewe handels erfdiensbaarhede, is die belangrike kwessie vir ooreenstemming met die *utilitas* vereiste dat die heersende erf ontwikkel, toegewys en gebruik moet word op so ‘n wyse dat die serwituut op ‘n volhoubare basis, bruikbaar vir die heersende erf moet wees. Negatiewe handelserwitute is egter ‘n betwiste aangeleentheid aangesien sodanige ooreenkomste aanleiding kan gee tot anti-mededinging. Desnieteenstaande, bestaan daar oortuigende beleids-argumente vir die erkenning van sodanige serwitute. Verder, indien negatiewe handelsregte as beperkte saaklike regte erken kan word, sal wetgewing benodig word ten einde te verseker dat die regte van die partye wat bevoordeel en geaffekteer word daardeur gebalanseer word. Die slotsom is dat ‘n wetgewende raamwerk voorgestel en geïmplementeer moet word wat voorwaardes bevat wat bepaal wanneer sodanige serwitute geregistreer kan word as beperkte saaklike regte. Indien ‘n handelsreg nie in ooreenstemming is met die vestigingsvereistes vir ‘n erfdiensbaarheid nie, dan is dit moontlik dat ‘n persoonlike serwituut geregistreer kan word.

Ten einde alternatiewe te soek vir die strukturering van handelsregte, kan ‘n positiewe reg om handel te dryf ook gereguleer word deur ‘n huurooreenkoms of as ‘n innominate kontrak. ‘n Handelsbeperkingsooreenkoms kan ook alternatiewelik as ‘n beperkende voorwaarde geregistreer word. Nadat alle moontlike regstrukture geëvalueer is, is die gevolgtrekking dat ‘n positiewe reg om handel te dryf verkieslik die struktuur van ‘n erfdiensbaarheid, persoonlike serwituut of die struktuur van ‘n geregistreerde lang-termyn huurooreenkoms moet aanneem. Die rede vir hierdie gevolgtrekking is dat individue se regte beter beskerming sal geniet in die vorm van ‘n beperkte saaklike reg as ‘n persoonlike serwituut aangesien dit *erga omnes* afdwingbaar sal wees. Weens die ooreenstemmende inhoud van ‘n beperkende voorwaarde en ‘n negatiewe serwituut wat handelsregte beperk, illustreer die proefskrif dat ‘n serwituut voldoende sal wees om sodanige reg te beskerm. Verder, beperkende voorwaardes is onseker van aard en word geag oorbodig te wees in die Suid-Afrikaanse regstelsel. Daarom sal die bepaling van die beperking van handelsregte as ‘n serwituut waarskynlik beter geskik wees.

# Trading servitudes as a novel category of servitudes in South African law

# Chapter 1: Introduction

## 1 1 Introduction to the research problem

In *Masstores (Pty) Ltd v Pick 'n Pay Retailers (Pty) Ltd*,[1] the applicant (a third party co-tenant) interfered with the trade of the respondent who was an anchor tenant in a shopping center. The anchor tenant sought to protect its exclusive contractual right to trade as a supermarket in the shopping center. This exclusive contractual right was granted to the anchor tenant by the lessor in terms of a lease agreement. The anchor tenant sought enforcement of the contractual exclusivity right against the third party co-tenant, although there was no contractual relationship between the anchor tenant and the co-tenant. However, Froneman J in the Constitutional Court stated that South African law does not usually recognise exclusive rights as worthy of general protection because the underlying purpose of the law of unlawful competition is to protect free competition and not to undermine competition by making it less free.[2] Froneman J also stated that there is no legal duty on third parties not to infringe on contractually derived exclusive rights to trade.[3] This case is important for purposes of property law (and highlights the research question of this dissertation) in that Froneman J asserted that to protect an exclusive right to trade embedded in a lease agreement, the anchor tenant *should have* negotiated for a real right, like a negative personal servitude and not merely a personal right. This is because a real right would have given notice to all later lessees that their usage of their leased premises is limited.[4] What would ultimately have been created in this regard is a new category of servitude, which is the underlying issue in this research.

This dissertation will focus on the creation of new categories of servitudes in land. More specifically, the research will question whether trading rights can be recognised as servitudes. Two main categories of trading rights (each of which could be either a praedial or a personal servitude) can be distinguished, namely an individual's right to trade on someone else's land or the right to prevent someone from trading on their own land. The first category of trading rights can potentially be classified as a positive servitude and the latter category as a negative servitude. A positive servitude generally

[1] 2017 (1) SA 613 (CC).
[2] *Masstores (Pty) Limited v Pick 'n Pay Retailers (Pty) Limited* 2017 (1) SA 613 (CC) 33.
[3] *Masstores (Pty) Limited v Pick 'n Pay Retailers (Pty) Limited* 2017 (1) SA 613 (CC) 36.
[4] *Masstores (Pty) Limited v Pick'n Pay Retailers (Pty) Limited* 2017 (1) SA 613 (CC) 44.

authorises the servitude holder to use the servient land in a certain way, whereas a negative servitude requires the owner of the servient land to refrain from using the servient tenement in a specific way.[5]

The research questions that the dissertation aims to address are: whether it is possible to recognise trading rights as a category of servitudes; what its nature and content would be if such recognition is possible; and under which conditions such servitudes could be registered. South African case law has revealed the courts' willingness to regard the right of an individual to trade on another's land, and a right to prevent another person from trading on their own land, as a praedial or a personal servitude.[6] However, the relevant case law is not equally clear in all instances, especially in terms of whether the requirements of servitude law should be complied with.

Although, South African property law does not recognise a *numerus clausus* of real rights, it is very careful about recognising new real rights in land outside of the traditional categories.[7] The following categories of real rights are traditionally recognised as real rights in land and regularly encountered in legal practice: ownership, servitudes, mortgages, mineral rights, mining rights and long-term leases. Restrictive covenants are also recognised as a limited real right in South African law, however the practice of using restrictive covenants has essentially become redundant.[8]

South African law has in the past recognised new real rights in land outside of the traditional categories as mentioned above. An overview of case law and academic literature regarding the creation of new real rights shows that servitude law is one of the most common categories of limited real rights in land in which the courts have developed new real rights.[9] Apart from the praedial servitudes of trek path and outspan, South African law acknowledges the servitudes of 'market square', the servitude of

[5] CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2 ed (2010) para 555.
[6] See chapter 4 part 4 3 2 and chapter 5 part 5 2 3.
[7] CG van der Merwe "*Numerus clausus* and the development of new real rights in South Africa" (2002) 119 *South African Law Journal* 802 802-803; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* 5 ed (2006) 48.
[8] J van Wyk *Planning law* 2 ed (2012) 303.
[9] CG van der Merwe "*Numerus clausus* and the development of new real rights in South Africa" (2002) 119 *South African Law Journal* 802 802-815; AJ van der Walt "*Novel servitudes Liber Amicorum – Essays in honour of JC Sonnekus Sakereg*" 2017 *Tydskrif vir die Suid-Afrikaanse Reg* 408 408-420.

'submersion', commonage, water storage, as well as new types of personal servitudes (*servitutes irregulares*). These categories of servitudes are examples of newly developed, uniquely South African, servitudes.[10]

To be established as a praedial servitude, the following requirements should be complied with in addition to the registration requirement: there must be two tenements belonging to different owners; a praedial servitude must offer a relatively durable benefit to the owner of the dominant land and must not merely serve her personal pleasure; and a praedial servitude cannot impose a positive duty on the owner of the servient tenement. A problem with recognition of trading rights as praedial servitudes is whether they comply with the requirements for the creation of limited real rights in land. The biggest problem with recognition of trading rights as praedial servitudes is whether they comply with the *utilitas* requirement; in the absence of utility, a personal servitude is possible but not a praedial servitude. Case law indicates that the *utilitas* requirement is satisfied and that a praedial servitude is possible if the use of the dominant land complies with certain development-and-appointment requirements. The biggest problem with recognition of trading servitudes as personal servitudes is whether they comply with the requirements for the creation of limited real rights in land. Case law seems to accept too easily that the requirements for a praedial and personal servitude have been or will be complied with – hence the need for a more in-depth analysis of/on the topic.

## 1 2 Research aims, hypotheses and methodology

In light of some of the issues highlighted above, the aims of this research are to determine whether an individual's right to trade on someone else's land or to prevent someone from trading on their own land can constitute a limited real right in terms of section 63(1) of the Deeds Registries Act 47 of 1937 and the subtraction from the *dominium* test. Furthermore, it is necessary to question the extent to which trading rights could comply with the requirements for the establishment of praedial and

[10] CG van der Merwe *Sakereg* 2 ed (1989) 507; CG van der Merwe "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2 ed (2010) para 569; CG van der Merwe "*Numerus clausus* and the development of new real rights in South Africa" (2002) 119 *South African Law Journal* 802 804. In *National Stadium SA (Pty) Ltd and Others v Firstrand Bank Ltd* 2011 (2) SA 157 (SCA) a personal servitude, to name a soccer stadium erected with financing obtained from it, was created in favour of First National Bank.

personal servitudes. In this regard, reference is made to applicable legislation and case law with the view to determining the circumstances in which trading rights might be regarded as registrable praedial or personal servitudes.

My hypothesis is that novel servitudes can be created, provided that they comply with the general requirements of section 63(1) of the Deeds Registries Act and the subtraction from the *dominium* test as developed in case law.[11] Once a novel servitude is recognised as a limited real right in land that burdens the servient landowner and all her successors in title, the question is what type of servitude comes into existence (praedial or personal). If a praedial servitude is created in the context of trading rights, it also has to comply with the more specific requirements for the establishment of praedial servitudes.[12] In contrast, if a personal trading servitude is created, it has to comply with the requirements in South African law for the establishment of personal servitudes.[13] In addition to the requirements for the establishment of praedial and personal servitudes, both these types of servitudes might be subject to statutory requirements and limitations found in the Deeds Registries Act.[14] Thus, the research will analyse the general requirements for the establishment of new limited real rights and for particular categories of servitudes, with the purpose to determine whether trading rights comply with them.

In order to investigate the research problem, this dissertation will make use of the following methodologies: an analysis of section 63(1) of the Deeds Registries Act and the subtraction from the *dominium* test as developed by South African courts; an analysis of the common law requirements for the creation of praedial and personal servitudes in land; an analysis of case law dealing with the right to trade and the right to prevent another from engaging in commercial activities on their own land; and a policy analysis of considerations in favour of, or against, recognition of trading rights as servitudes, particularly in the context of restraint of trade rights. Although South African law will be the main focus of this dissertation, a comparative perspective will be provided in some places to enrich the discussion of whether other jurisdictions recognise trading servitudes. In this regard, a comparative overview will not be holistic or comprehensive to the extent that separate comparative chapters are warranted. The

[11] See chapter 2 part 2 4.
[12] See chapter 3 part 3 2.
[13] See chapter 3 part 3 3.
[14] See chapter 4 part 4 2 3 2 footnote 55; chapter 3 part 3 3 2 1 footnote290; part 3 2 2 4 footnotes 109-110.

comparative analysis will be supplementary to the main focus, which will be South African law.

## 1 3 Overview of chapters

This dissertation consists of seven chapters, including the current introductory chapter. Chapter 2 investigates the *numerus clausus* principle and the possible creation of new limited real rights in South African law. The chapter focusses on whether South African law provides the parameters for the recognition of novel trading servitudes given the fairly strict *numerus clausus* principle and the subtraction from the *dominium* test as developed by South African courts in order to distinguish between real rights and personal rights. In this regard, the chapter will set out the statutory and doctrinal framework and the criteria for the development of novel limited real rights extensively. The main aim of the chapter is to reach conclusions about the degree to which the *numerus clausus* principle and the subtraction from the *dominium* test pose potential barriers to the recognition of trading rights as servitudes in South African law.

Chapter 2 will essentially set the platform for an investigation into the establishment requirements for praedial and personal servitudes, which are discussed in chapter 3. These validity requirements for the establishment of servitudes are directly linked to the statutory and doctrinal framework mentioned in chapter 2 concerning the creation of novel limited real rights as it serves as an anti-fragmentation device to prevent undue impediments on land. Therefore, chapter 3 will discuss and analyse the establishment requirements for praedial and personal servitudes in order to determine when and how they are relevant to the recognition of trading rights as praedial and/or personal servitudes. Chapters 2 and 3 provide the basis for the extensive analysis that will take place in chapters 4 and 5, more specifically in the context of trading rights.

Chapters 4 and 5 investigate the nature and content of positive and negative trading rights (each of which could either be a praedial or a personal servitude) through the prism of South African case law. Chapter 4 will deal specifically with the positive trading rights and chapter 5 with the negative trading rights. These chapters investigate whether the common law establishment requirements as discussed in chapter 3 are complied with to acknowledge novel trading servitudes. The hope is to arrive at a

conclusion about whether positive trading rights could be adequately protected in property law. There is authority in South African law for the recognition of a positive personal servitude to trade on the servient tenement in favour of the beneficiary in his personal capacity.[15] There are also indications that courts might consider a positive praedial trading servitude, created in favour of the dominant tenement, to conduct commercial activity on the servient land, on the condition that the link between the servitude and use of the dominant land is direct and beneficial.[16] However, to date South African courts have not clearly recognised a positive praedial trading servitude.[17] There is early case law that seemingly supports recognition of a negative praedial trading servitude,[18] but those early decisions to this effect should arguably not be regarded as authority because the servitudes in those cases did not satisfy the *utilitas* requirement for praedial servitudes.[19] The South African authority pertaining to negative, personal servitudes in restraint of trade have been inconclusive until 2016 when the Constitutional Court in *Masstores (Pty) Ltd v Pick 'n Pay Retailers (Pty) Ltd*[20] shed light on the matter regarding restraint of trade clauses embedded in commercial lease agreements. Chapters 4 and 5 will therefore analyse and explain the factors that influence the recognition of trading servitudes, in the hope of coming to a general conclusion that will determine under which conditions a servitude to trade on another individual's land will be regarded as a positive praedial or personal trading servitude and under which circumstances a right to prevent another from trading on their own property in order to protect the dominant tenement from commercial competition can be either a negative praedial or personal trading servitude.[21]

A further question that becomes relevant in the context of this research problem, is the determination of whether it is necessary to structure trading rights as novel servitudes, or whether there are alternative mechanisms to structure these types of agreements. Chapter 6 will investigate alternative ways of structuring trade agreements. The chapter will specifically focus on examples from case law where

---

[15] *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1913 AD 267 280-282; *Ex parte Steinberg* 1940 CPD 1 5-6.
[16] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 180-181, 185.
[17] *Stuart v Grant* (1903) 24 NLR 416.
[18] *Tonkin v Van Heerden* 1935 NPD 589; *Venter v Minister of Railways* 1949 (2) SA 178 (EC).
[19] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 185-186, 190-192.
[20] 2017 (1) SA 613 (CC).
[21] *Tonkin v Van Heerden* 1935 NPD 589; MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 185-186.

trading rights were not specifically structured as servitudes. The primary goal is to determine whether it is necessary to structure agreements to create trading rights as novel servitudes, given the variety of alternative ways in which agreements of such a nature relating to trading rights have been designed in the past.

The concluding chapter will provide a summary of the findings of the dissertation and aims to provide reflections on the most appropriate way forward in terms of structuring these types of agreements in future.

# Chapter 2: The *numerus clausus* principle and the possible creation of new limited real rights

## 2 1 Introduction

As mentioned in the introductory chapter, this dissertation aims to address whether trading rights can be recognised as servitudes in South African law. If it is possible to recognise such a novel category of servitudes, it needs to be determined what its nature and content would be, and under which conditions such servitudes could be registered. To begin with, it is necessary to draw a distinction between the possible categories of trading rights that could potentially be created. This will set the context for the question of whether South African law provides the parameters for the recognition of novel trading servitudes, firstly within the ambit of the *numerus clausus* principle, and secondly within the context of the subtraction from the *dominium* test as developed by South African courts in order to distinguish between real rights and personal rights. The ultimate aim of the chapter is to draw conclusions about the extent to which the *numerus clausus* principle and the subtraction from the *dominium* test pose potential barriers to the recognition of new limited real rights like trading rights. This will be done by setting the groundwork in chapter 2.

## 2 2 Contextualisation: Distinguishing between real rights and personal rights

The following categories of real rights are traditionally recognised as real rights in land: ownership, servitudes, restrictive covenants, mortgages, mineral rights, mining rights and long-term leases.[1] Trading rights could possibly fit the description of a real right, more specifically a limited real right in the form of a servitude. Two main categories of trading rights (each of which could potentially be either a praedial or a personal servitude) can be distinguished, namely an individual's right to trade on someone

[1] CG van der Merwe *Sakereg* 2 ed (1989) 65-66; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* 5 ed (2006) 48: "Since the introduction of the Mineral and Petroleum Resources Development Act 28 of 2002, mineral and mining rights are only recognised for purposes of transitional measures contained in the Act and have been replaced by new statutory real rights, namely prospecting rights and mining rights to minerals and exploration rights and production rights to petroleum."

else's land or the right to prevent someone from trading on their own land.[2] The first category can potentially be classified as a positive servitude and the latter as a negative servitude. A positive servitude in this context authorises the servitude holder to use the servient land in a specified way, whereas a negative servitude requires the owner of the servient land to refrain from using the servient tenement in a certain way.[3] The South African law of property does not recognise a *numerus clausus* of real rights, which means that novel servitudes can be created, provided that they comply with the requirements of section 63(1) of the Deeds Registries Act 47 of 1937, the subtraction from the *dominium* test as laid down in case law, other relevant legislation and the requirements for the general establishment of praedial and personal servitudes.[4] Even though South Africa does not have a *numerus clausus* of real rights, South African property law is very careful about recognising new real rights in land outside of the traditional categories.[5]

Section 63(1) of the Deeds Registries Act provides that only real rights burdening land can be registered. To determine the nature and content of a trading right and whether it could fit the description of a servitude, it is important to understand the general underlying principles of the law of property and how they specifically relate to servitudes. In this regard, it is important to note that a distinction can be made in property law between two types of relationships with regard to property, namely possession and rights.[6] Rights can be real or personal.[7] The distinction between real and personal rights forms the basis for the division of the law of property and the law of obligations.[8] The law of property is essentially concerned with real rights whereas

---

[2] Chapters 4 and 5 below will discuss the nature (praedial or personal) and content (positive or negative) of trading servitudes. In this regard chapter 4 will deal with positive trading servitudes and chapter 5 with negative trading servitudes.

[3] CG van der Merwe "Servitudes" in HJ Erasmus, CG van der Merwe & AH van Wyk (eds) *Lee and Honoré Family, things and succession* 2 ed (1983) 300; CG van der Merwe *Sakereg* 2 ed (1989) 458-459; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 526-527; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* 5 ed (2006) 321; CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2 ed (2010) para 555; AJ van der Walt *The law of servitudes* (2016) 57-58.

[4] AJ van der Walt *The law of servitudes* (2016) 74, 94, 405-406, 445.

[5] CG van der Merwe "*Numerus clausus* and the development of new real rights in South Africa" (2002) 119 *South African Law Journal* 802 802.

[6] H Mostert & A Pope (eds), P Badenhorst, W Freedman, J Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 41-42. This dissertation will specifically focus on rights with regard to property.

[7] CG van der Merwe *Sakereg* 2 ed (1989) 58-63; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 87-101; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* 5 ed (2006) 47-54.

[8] CG van der Merwe *Sakereg* 2 ed (1989) 58; P Badenhorst, W Freedman, J Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 50; PJ Badenhorst, JM Pienaar & H Mostert

the law of obligations is focussed on personal rights. The practical significance of the distinction between real and personal rights is that different repercussions flow from real rights than from personal rights.[9] In addition, the manner in which these rights are acquired, exercised and protected are different.[10] Real rights may be enforced against third parties whereas personal rights bind only a specific person or a defined group of persons.[11] Furthermore, real rights are protected by proprietary remedies, whereas personal rights are protected by contractual and delictual remedies.[12] In legal practice this distinction is important with regard to the registration of real rights in respect of land at the deeds office.[13] Personal rights create a relationship between one person and another by creating an obligation that is also called a 'performance'.[14] A personal right can only be enforced against a particular person,[15] namely the person subject to the obligation and is thus generally a weaker right compared to a real right in terms of enforceability. Furthermore, real rights are transferred by registration in the case of immovable property and by way of delivery with movables.[16] Personal rights, on the other hand, are transferred by way of cession.[17] Real and limited real rights with regard to land are registrable in the Deeds Registry,[18] whereas personal rights may, subject

---

*Silberberg & Schoeman's The law of property* 5 ed (2006) 47-69; CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2 ed (2010) para 59; CG van der Merwe "Things, time, time-sharing and shareblocks" in WA Joubert, JA Faris & LTC Harms (eds) *The law of South Africa* vol 27 2 ed (2014) para 59. Chapter 6 below will discuss the law of contract as an alternative instrument to regulate the right to trade on another individual's property. It will show that the law of contract as an alternative instrument to regulating the right to trade on someone else's property only provides a personal right, whereas the law of property, which allows for the creation of a servitude, provides a limited real right, which in essence is stronger than a mere personal right. Chapter 6 will be pivotal in considering whether real rights are more effective than a personal right in the structuring of trading rights.

[9] CG van der Merwe "Things, time, time-sharing and shareblocks" in WA Joubert, JA Faris & LTC Harms (eds) *The law of South Africa* vol 27 2 ed (2014) para 59.

[10] H Mostert & A Pope (eds), P Badenhorst, W Freedman, J Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 42.

[11] H Mostert & A Pope (eds), P Badenhorst, W Freedman, J Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 47.

[12] H Mostert & A Pope (eds), P Badenhorst, W Freedman, J Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 47.

[13] H Mostert & A Pope (eds), P Badenhorst, W Freedman, J Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 50.

[14] PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* 5 ed (2006) 51; H Mostert & A Pope (eds), P Badenhorst, W Freedman, J Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 45.

[15] CG van der Merwe "Things, time, time-sharing and shareblocks" in WA Joubert, JA Faris & LTC Harms (eds) *The law of South Africa* vol 27 2 ed (2014) para 60.

[16] Section 63(1) of the Deeds Registries Act 47 of 1937; H Mostert & A Pope (eds), P Badenhorst, W Freedman, J Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 47.

[17] H Mostert & A Pope (eds), P Badenhorst, W Freedman, J Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 47.

[18] Section 3(1) of the Deeds Registries Act 47 of 1937; *Cape Explosive Works Ltd v Denel (Pty) Ltd* 2001 (3) SA 569 (SCA) para 12; PJ Badenhorst "Registrability of right in the deeds registry: The twofold test revisited" (2018) 29 *Stellenbosch Law Review* 220.

to a few exceptions,[19] not be registered.[20] This requirement of registration serves a dual function.[21] Firstly, it indicates the act of delivery in respect of derivative acquisition of ownership of immovable property or real rights to land and, secondly, it provides a public record of real rights in land. As soon as a real right has therefore been created it is enforceable *erga omnes* (against the whole world).[22] However, the erroneous omission of a real right from the title deed does not necessarily extinguish the right.[23] It will remain binding on the owner of the property and successors in title. Moreover, the erroneous inclusion of personal rights in a title deed will not necessarily transform such a right into a real right.

In South African law the distinction between real and personal rights assimilates something of a mystical nature and it is usually presented as a problem without a solution.[24] The Deeds Registries Act does not provide a definition or guidelines for the distinction between real and personal rights.[25] The question that courts often have to determine is whether the nature of a particular disputed right or condition is real or personal. To draw such a distinction, early South African academic authors relied strongly upon the authority of Roman-Dutch authors such as Grotius, Van Leeuwen and Van der Linden.[26] Grotius describes a real right as a right that provides direct power over a thing, without reference to other persons, whereas a personal right is characterised as a right that is exercised against a specific person, who is obliged to *dare*, *facere* or *non facere*.[27] Grotius distinguishes real rights from personal rights by

[19] See the proviso to section 63(1) and 63(2) of the Deeds Registries Act 47 of 1937. See further PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 66-69; PJ Badenhorst "Registrability of rights in the deeds registry: The twofold test revisited" (2018) 29 *Stellenbosch Law Review* 220.

[20] Section 63(1) of the Deeds Registries Act 47 of 1937 prohibits the registration of personal rights. See CG van der Merwe *Sakereg* 2 ed (1989) 333-345; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 229-239; CG van der Merwe "Things, time, time-sharing and shareblocks" in WA Joubert, JA Faris & LTC Harms (eds) *The law of South Africa* vol 27 2 ed (2014) para 62; H Mostert & A Pope (eds), P Badenhorst, W Freedman, J Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 42.

[21] PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 65.

[22] *Cape Explosive Works Ltd v Denel (Pty) Ltd and Others* 2001 (3) SA 569 (SCA) 579.

[23] *Cape Explosive Works Ltd v Denel (Pty) Ltd and Others* 2001 (3) SA 569 (SCA) 579.

[24] AJ van der Walt "Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 170 179.

[25] PJ Badenhorst "Registrability of rights in the deeds registry: The twofold test revisited" (2018) 29 *Stellenbosch Law Review* 220.

[26] J Schets *Van het recht van de Zuid-Afrikaansche Republiek* (1897) 5 10-11. See also AJ van der Walt "Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 170 182 footnote 83.

[27] Grotius 2 1 58. Translation: to give, to do or not to do.

highlighting the direct character of real rights in that they are exercised without reference to any other person. Therefore, according to Grotius' definition, a real right is not a legal relationship that exists between two or more individuals with reference to a thing, instead it is a relationship that exists between a person and a thing without reference to other people.[28] The common-law distinction as it was formulated by Grotius and followed by other Roman-Dutch authors[29] was also developed by the German Pandectists.[30] For example, Brinz[31] asserted that personal rights might involve a thing indirectly, and that it might bind the owner of the thing, but that it can never bind the thing itself. Thus, it is said that personal rights do not constitute limitations of ownership, but only limitations on the owner in her personal capacity. Windscheid,[32] on the other hand, clarifies that the will of the holder of a real right is authoritative (as against other persons) with regard to a thing,[33] whereas the will of the holder of a personal right is authoritative (as against other persons) for a specific performance by a specific person.[34]

When establishing the legal nature of a real right, different theories have evolved to provide aid in drawing a distinction between real rights and personal rights.[35] In

---

[28] AJ van der Walt "Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 170 176.

[29] Vinnius on *Inst* 2 1 11 1; Huber *Heedendaegse rechtsgeleertheyt* 2 2 1 1 – 2 2 17, 2 38 3; Van Leeuwen *Rooms-Hollands regt* 2 2 1; Voet 6 1 1; Van der Keessel on *Inleidinge* 2 3 1 and 2 33 1 (vol II 38, vol III 136). See AJ van der Walt "Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 170 176.

[30] AJ van der Walt "Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 170 178.

[31] *Pandekten* vol 1 book 3 part 1 sec 1 1 1 (184-185). See AJ van der Walt "Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 170 178.

[32] B Windscheid *Lehrbuch des Pandektenrechts* vol 1 book 2 (1900) par 38-39 (140-146). See AJ van der Walt "Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 170 178.

[33] B Windscheid *Lehrbuch* vol 1 book 2 (1900) para 38 (140). See AJ van der Walt "Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 170 178.

[34] B Windscheid *Lehrbuch des Pandektenrechts* vol 1 book 2 para 39 144. See AJ van der Walt "Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 170 178.

[35] AJ van der Walt "Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 170 179-194. CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2 ed (2010) para 42; PJ Badenhorst, JM Pienaar & Mostert H *Silberberg & Schoeman's The law of property* 5 ed (2006) 50.

addition to the early academic writings, two main theories have been developed to aid in distinguishing a real right from a personal right, namely the personalist and the classical theories.[36] The personalist theory draws a distinction between real rights and personal rights in relation to the person against whom the rights are enforceable.[37] In terms of this theory a real right is absolute to the extent that it prevails against the world at large. Personal rights in turn are relative to the extent that they can only be enforced against a particular individual, namely the other party to the contractual obligation. The classical theory holds that real rights are mainly concerned with the relationship between a person and a thing, whereas personal rights in turn concerns the relationship between two persons.[38] Therefore, the classical theory focusses on the object of the right. The personalist and classical theories as well as additional theories[39] retained the basic distinction as it was described by Grotius and the Pandectists even though they have been subjected to criticism in some respects.[40] Van der Merwe, for instance, argues that neither the classical theory nor the personalist theory advanced to draw a distinction between real and personal rights are acceptable. He asserts that the reason for this is that legal development is neither logical, nor does it follow dogma as it is regularly influenced by considerations of policy.[41] Therefore, the

[36] For a discussion of the two tests and additional tests as well as their weaknesses, see further CG van der Merwe *Sakereg* 2 ed (1989) 60-63; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* 5 ed (2006) 50-55, 57; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 89-100; CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2 ed (2010) para 60; JC Sonnekus "Gebrek aan wetenskap vervlak regspraak tot kasuïstiek – *Willow Waters Homeowners Association (Pty) Ltd v Koka* (768/13) 2014 ZASCA 220 (12-12-2014)" 2015 *Tydskrif vir die Suid Afrikaanse Reg* 405 407-408. See also PJ Badenhorst "Registrability of rights in the deeds registry: The twofold test revisited" (2018) 29 *Stellenbosch Law Review* 220 221.

[37] CG van der Merwe *Sakereg* 2 ed (1989) 60-62; AJ van der Walt "Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 170 186-189; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* 5 ed (2006) 51; CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2 ed (2010) para 60.

[38] CG van der Merwe *Sakereg* 2 ed (1989) 62; AJ van der Walt "Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 170 184-186; CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2 ed (2010) para 60; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* 5 ed (2006) 50-51.

[39] For instance, the subtraction from the *dominium* test, relative real rights, the theory of subjective rights and the prototype approach. See AJ van der Walt "Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 170-203.

[40] AJ van der Walt "Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 170 194.

[41] CG van der Merwe *Sakereg* 2 ed (1989) 63.

seeming simplicity of these theories makes it difficult to practically adopt them. From academic literature, it appears that the distinction between real and personal rights remains challenging.[42] Regardless of the practical challenges faced in determining whether a particular right amounts to a personal or real right, it can confidently be asserted that the definition of a real right is a claim that a legal subject has with regard to a thing as against the world.[43] A real right has third party effect as opposed to a personal right that is only enforceable against the parties to the contractual agreement.

Now that it has been established what the essence of a real right entails and the protection that it offers, it is important to proceed very briefly to the discussion pertaining to the distinction between ownership and limited real rights in order to place the context for a servitudal right of trade. Ownership is the only real right which confers the most comprehensive control over a thing and it is the only right held in one's own property (*ius in re propria*).[44] The notion of ownership is often described as being the most, all-encompassing power with regard to a thing.[45] A right that is described as 'lesser' than ownership is a *limited* real right and this right is held by a non-owner in the property that is owned by another (*ius in re aliena*).[46] Since this dissertation aims to determine whether trading rights could fit into the category or mould of a servitude,

---

[42] Chapter 2 part 2 4 2 will discuss the criteria as developed by South African courts to determine whether a particular right is of a real or personal nature.

[43] PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* 5 ed (2006) 47; H Mostert & A Pope (eds), P Badenhorst, W Freedman, J Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 42.

[44] PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* 5 ed (2006) 47; H Mostert & A Pope (eds), P Badenhorst, W Freedman, J Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 42.

[45] CG van der Merwe *Sakereg* 2 ed (1989) 458; MJ de Waal "Servitudes" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785 787; CG van der Merwe "Things, time, time-sharing and shareblocks" in WA Joubert, JA Faris & LTC Harms (eds) *The law of South Africa* vol 27 2 ed (2014) para 9; P Dhliwayo *A constitutional analysis of access rights that limit landowners' right to exclude* LLD dissertation Stellenbosch University (2015) 25. It is important to note that ownership is not a bundle of rights of which one is removed and transferred to the holder of the servitude. The bundle of rights explanation of property is a product of American realism of the earlier twentieth century. See GS Alexander *The global debate over constitutional property: Lessons for American takings jurisprudence* (2006) 78, who noted that the realists popularised the bundle-of-rights notion of rights. They emphasised the nature of the notion of the bundle-of-rights as being a complex set of legal relationships between persons instead of a physical relationship between a person and an object. However, modern South African property law still emphasises the direct relationship between the holder of a property right and the object of the right. South African property law reflects the strong influence of object-focused thinking in the Roman-Dutch tradition and the lack of influence from realism in modern South African law. A di Robilant "Property: A bundle of sticks or a tree?" (2013) 66 *Vanderbilt Law Review* 869-932 878 footnote 32 asserts that the first use of the bundle-of-rights metaphor to describe the modern concept of property is in MJ Horwitz *The transformation of American law 1870-1960: The crisis of legal orthodoxy* (1992) 145. AJ van der Walt *The law of servitudes* (2016) 66 footnote 28.

[46] H Mostert & A Pope (eds), P Badenhorst, W Freedman, J Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 42.

it is important to understand the fundamental nature of a servitude as a limited real right and how it differs from ownership as a *complete* real right.[47]

A servitude is a limited real right that imposes a burden on movable or immovable property to the extent that it restricts the rights, powers or liberties of its owner in favour of either another person or the owner of another immovable property.[48] The servitude holder obtains certain entitlements of use and enjoyment with regard to another individual's property.[49] When a servitude is granted by the owner of the land to another, it will ordinarily result in a diminution of one or more of the owner's entitlements of ownership.[50]

The understanding that a servitude is a limited real right consists of two elements, namely that servitudes are real rights and that they are specifically *limited* real rights.[51] Servitudes are real rights since the holder of a real right enjoys a direct right in the property and this right is said to be absolute due to the fact that it is protected by a real remedy and is enforceable against the whole world. The expression that it is enforceable against the whole world essentially, means that the real right is enforceable against any person who owns the servient tenement or a subsequent acquirer of the servient tenement, irrespective of the fact that the owner of the servient tenement was not a party to the agreement in which the right was initially created.[52] It is the direct relationship between the holder of the servitude and the property to which the right relates that correspondingly distinguishes it from a personal right, which is enforceable only against the owner of the property in her personal capacity.

To maintain the clear distinction between real and personal rights and to eliminate any doubt about whether a novel (trading) right is real or personal, most Civil law systems apply a closed system of real rights (or *numerus clausus*) with regard to the

---

[47] Real rights in land are traditionally divided into ownership of land and limited real rights of another individual with regard to land. See CG van der Merwe *Sakereg* 2 ed (1989) 69 and PJ Badenhorst "Registrability of rights in the deeds registry: The twofold test revisited" (2018) 29 *Stellenbosch Law Review* 220 221-222.

[48] CG van der Merwe & MJ De Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2 ed (2010) para 540; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* 5 ed (2006) 321; AJ van der Walt *The law of servitudes* (2016) 57.

[49] CG van der Merwe *Sakereg* 2 ed (1989) 458; AJ van der Walt *The law of servitudes* (2016) 57.

[50] CG van der Merwe *Sakereg* 2 ed (1989) 458: When an owner grants a servitude to the servitude holder, he does not waive his rights to another, but he consents that his powers of use and enjoyment will be suspended or limited to a certain extent. See also AJ van der Walt *The law on servitudes* (2016) 64-65.

[51] AJ van der Walt *The law of servitudes* (2016) 90.

[52] AJ van der Walt *The law of servitudes* (2016) 91.

law of property.[53] The main purpose of the *numerus clausus* principle is to achieve certainty and predictability in the law of property by listing the traditional categories of rights that qualify as a real right. As noted before, the South African law of property does not recognise a *numerus clausus* of real rights,[54] which means that entirely new limited real rights in general, and more specifically a new category of servitudes, can in principle be created, provided that they comply with the specific requirements of section 63(1) of the Deeds Registries Act, the subtraction from the *dominium* test as laid down in case law, other relevant legislation and the requirements for the establishment of praedial and personal servitudes.[55] When individuals require completely novel categories of real rights to be created it may pose problems in certain circumstances. This is because in South African law, when courts are confronted with the question whether a condition amounts to a novel category of real right, they often struggle to determine whether the specific condition has the nature of a real or personal right. This is due to the fact that the Deeds Registries Act does not explicitly define the nature of what such a right entails.[56] As a result, the duty of determining the boundary between real and personal rights has been left up to the courts.[57] The criteria that the courts have developed over the years in South African law are usually applied inconsistently and have proven to yield different, and possibly incorrect, results as will

---

[53] THD Struycken *De numerus clausus in het goederenrecht* (2007) 245-248; B Akkermans *The principle of numerus clausus in European property law* (2008) 168, 244-252, 320-329; B Akkermans, V Sagaert & W Swadling "General issues: Setting the scene" in S van Erp & B Akkermans (eds) *Cases, materials and text on property law. Ius commune casebooks for the common law of Europe* (2012) 65.

[54] *Van der Merwe v Wiese* 1948 (4) SA 8 (C) 30; *Lorentz v Melle and Others* 1978 (3) SA 1044 (T) 1051; CG van der Merwe *Sakereg* 2 ed (1989) 11, 468; CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2 ed (2010) paras 545, 580; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 584-585; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* 5 ed (2006) 326; MJ de Waal "Servitudes" in R Zimmermann & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785-817 788; MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 14-15; AJ van der Walt *The law of servitudes* (2016) 63 footnote 18. B Akkermans *The principle of numerus clausus in European property law* (2008) 473-482 explains that section 63(1) of the Deeds Registries Act 47 of 1937 and the subtraction from the *dominium* test as developed by South African courts ensure that the absence of a *numerus clausus* principle does not result in a proliferation of new real burdens.

[55] Section 63(1) of the Deeds Registries Act 47 of 1937; *Ex parte Geldenhuys* 1926 OPD 155; *Lorentz v Melle and Others* 1978 (3) SA 1044 (T); *Pearly Beach Trust v Registrar of Deeds* 1990 (4) SA 614 (C) 615; *Cape Explosive Works Ltd and Another v Denel (Pty) Ltd and Others* 2001 (3) SA 569 (SCA); *Cowin NO and Others v Kyalami Estate Homeowners Association and Others* SGHC case no 12/11377, 25 February 2013; *Willow Waters Homeowners Association (Pty) Ltd v Koka NO and Others* 2015 (5) SA 304 (SCA). See chapter 3 for the discussion of the establishment requirements for the creation of a personal and a praedial servitude.

[56] MJ de Waal "Identifying real rights in South African law" in S Bartels & M Milo (eds) *Contents of real rights* (2004) 83 85; H Mostert & A Pope (eds), P Badenhorst, W Freedman, J Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 45.

[57] MJ de Waal "Identifying real rights in South African law" in S Bartels & M Milo (eds) *Contents of real rights* (2004) 83 85. See chapter 2 part 2 4 below.

be illustrated in this chapter. As a result of the inconsistency, Van der Merwe argues in favour of a strict (or more rigid) approach in the form of a closed list (*numerus clausus*) of real rights to establish legal certainty, and by doing so, preventing new categories of real rights from being created.[58] Alternatively, the legislature should recognise new types of real rights when the need arises.[59] The subsequent section will elaborate on the origin of the Civilian principle of the *numerus clausus*, the function that it serves and the reason why certain countries favour this particular principle as a fundamental, underlying principle of property law. In addition, the criteria for the establishment of a real right and the practical implementation thereof as developed by the courts in South Africa will also be analysed and discussed.

## 2 3 Basic principles of property law

### 2 3 1 The *numerus clausus* principle

The law of property is based on a number of basic principles.[60] These basic principles are regarded as the foundation on which property rules have developed and it forms the outline within which future property legal developments have to take place.[61] One of the basic principles of the civil law of property on which the law of things is based is the *numerus clausus* principle.[62] A *numerus clausus* is a closed system of real rights.[63]

---

[58] CG van der Merwe "Things, time, time-sharing and shareblocks" in WA Joubert, JA Faris & LTC Harms (eds) *The law of South Africa* vol 27 2 ed (2014) para 68.

[59] CG van der Merwe "Things, time, time-sharing and shareblocks" in WA Joubert, JA Faris & LTC Harms (eds) *The law of South Africa* vol 27 2 ed (2014) para 68. See Innes CJ in Hollins v Registrar of Deeds 1904 TS 603 606: "[E]ven though we may think that it would be desirable to extend the use of the Registry of Deeds in certain respects in view of the changed conditions of modern times, I think that any such extension would be best effected by the legislature, after full inquiry and with due safeguards."

[60] The basic principles of the law of things are: the principle of *numerus clausus*; the absolute character of real rights principle; the publicity principle; the specificity principle; the transmissibility principle; and the abstract principle. See CG van der Merwe *Sakereg* 2 ed (1989) 10-18; B Akkermans, V Sagaert & W Swadling "General issues: Setting the scene" in S van Erp & B Akkermans (eds) *Cases, materials and text on property law. Ius commune casebooks for the common law of Europe* (2012) 37 65-95.

[61] CG van der Merwe "Things, time, time-sharing and shareblocks" in WA Joubert, JA Faris & LTC Harms (eds) *The law of South Africa* vol 27 2 ed (2014) para 7.

[62] CG van der Merwe *Sakereg* 2 ed (1989) 11-12; MJ de Waal "Identifying real rights in South African law" in S Bartels & M Milo (eds) *Contents of real rights* (2004) 83; THD Struycken *De numerus clausus in het goederenrecht* (2007); B Akkermans *The principle of numerus clausus in European property law* (2008); B Akkermans, V Sagaert & W Swadling "General issues: Setting the scene" in S van Erp & B Akkermans (eds) *Cases, materials and text on property law. Ius commune casebooks for the common law of Europe* (2012) 37 65-74;

[63] CG van der Merwe *Sakereg* 2 ed (1989) 11; CG van der Merwe "*Numerus clausus* and the development of new real rights in South Africa" (2002) 119 *South African Law Journal* 802 802; B Akkermans *The principle of numerus clausus in European property law* (2008) 6-7.

According to the *numerus clausus* principle, only acknowledged real rights in land will be accepted by law.[64] This principle entails that only real rights which are recognised by law can be constituted and that the substance of an acknowledged real right is regarded as fixed and therefore not open to substantive change by any of the parties creating the specific right.[65]

In South African law, the following categories of real rights are traditionally recognised as types of real rights in land: ownership, servitudes, restrictive covenants, mortgages, mineral rights, mining rights and long-term leases.[66] In terms of the particular content of servitudes, the requirements of section 63(1) of the Deeds Registries Act, the subtraction from the *dominium* test as laid down in case law, other relevant legislation and the requirements for the establishment of praedial and personal servitudes will become relevant. The *numerus clausus* principle signifies that rights pertaining to objects are standardised and that only those rights which are dealt with by sources of law can exist.[67] Therefore, parties should use the types of property rights that are available to them when they consider which rights to create. When an individual wishes to establish a property right, she must select from the already available types of property rights as the outlines of the content of a real (or potential new) right is set down by mandatory law.[68] Any new or additional real right will be regarded as falling outside the closed system of real rights that already exists.[69] Even though parties have the liberty to modify property rights, they have to remain within the boundaries of the property right which they have selected. If they do attempt to create a new property right which does not meet the prescribed essential criteria of the right,

---

[64] CG van der Merwe *Sakereg* 2 ed (1989) 11; CG van der Merwe "*Numerus clausus* and the development of new real rights in South Africa" (2002) 119 *South African Law Journal* 802 802; MJ de Waal "Identifying real rights in South African law" in S Bartels & M Milo (eds) *Contents of real rights* (2004) 83.

[65] CG van der Merwe "*Numerus clausus* and the development of new real rights in South Africa" (2002) 119 *South African Law Journal* 802 802; B Akkermans, V Sagaert & W Swadling "General issues: Setting the scene" in S van Erp & B Akkermans (eds) *Cases, materials and text on property law. Ius commune casebooks for the common law of Europe* (2012) 37 65; B Akkermans *The principle of numerus clausus in European property law* (2008) 7. The limitation on the type of rights is known in German law as *Typenzwang* and the limitation on the content of the rights is known as *Typenfixierung*.

[66] CG van der Merwe *Sakereg* 2 ed (1989) 65-66. PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* 5 ed (2006) 48.

[67] B Akkermans, V Sagaert & W Swadling "General issues: Setting the scene" in S van Erp & B Akkermans (eds) *Cases, materials and text on property law. Ius commune casebooks for the common law of Europe* (2012) 37 68.

[68] B Akkermans, V Sagaert & W Swadling "General issues: Setting the scene" in S van Erp & B Akkermans (eds) *Cases, materials and text on property law. Ius commune casebooks for the common law of Europe* (2012) 37 69.

[69] MJ de Waal "Identifying real rights in South African law" in S Bartels & M Milo (eds) *Contents of real rights* (2004) 83.

it cannot be a property right and will ordinarily be regarded as a personal right.[70] This observation is important because chapters 3, 4 and 5 will illustrate that if a trading right does not comply with the establishment requirements of a servitude, the right will not constitute a property right, but may potentially create a personal right.

The reason for the existence of the *numerus clausus* principle can be found in legal history. Property law can only be explained in both common law and civil law by means of understanding the concept of feudalism.[71] Feudalism was the prevailing social system in medieval Europe. Feudalism was a legal system which primarily created a political and social framework that had the effect of establishing both property and personal relationships between the king; tenant-in-chief; mesne lord;[72] and vassal.[73] The feudal system was a system of governance (which in modern times is referred to as public or constitutional law) and a system of land holding (which would be referred to as private law in contemporary law).[74] Under the feudal system a lord would grant land use rights to an individual. The individual would render services in return for the use rights, by providing the lord with soldiers for an army. The king was at the top of the feudal pyramid and was known as the 'lord-paramount'.[75] The other individuals were subtenants because they held land from a lord.[76] During the period of the feudal legal system, ownership was not regarded as unitary and absolute.

---

[70] B Akkermans, V Sagaert & W Swadling "General issues: Setting the scene" in S van Erp & B Akkermans (eds) *Cases, materials and text on property law. Ius commune casebooks for the common law of Europe* (2012) 37 72.

[71] B Akkermans, V Sagaert & W Swadling "General issues: Setting the scene" in S van Erp & B Akkermans (eds) *Cases, materials and text on property law. Ius commune casebooks for the common law of Europe* (2012) 37 53. See also AJ van der Walt "*Novel servitudes Liber Amicorum – essays in honour of JC Sonnekus Sakereg*" 2017 *Tydskrif vir die Suid-Afrikaanse Reg* 408 408-411.

[72] See C Soanes & A Stevenson (eds) *Concise Oxford English dictionary* 11 ed revised (2006) 895: A mesne lord was a lord who held an estate from a superior feudal lord.

[73] B Akkermans, V Sagaert & W Swadling "General issues: Setting the scene" in S van Erp & B Akkermans (eds) *Cases, materials and text on property law. Ius commune casebooks for the common law of Europe* (2012) 37 54; AJ van der Walt *The law of servitudes* (2016) 23 cites S van Erp "A *numerus quasi-clausus* of property rights as a constitutive element of future European property law?" in K Boele-Woelki, CH Brants & GJW Steenhoff (eds) *Het plezier van de rechtsvergelijking. Opstellen over unificatie en harmonisatie van het recht in Europa aangeboden aan prof mr EH Hondius* (2003) 39-52. A vassal was a holder of land by feudal tenure on conditions of homage and allegiance: C Soanes & A Stevenson (eds) *Concise Oxford English dictionary* 11 ed revised (2006) 1600.

[74] B Akkermans, V Sagaert & W Swadling "General issues: Setting the scene" in S van Erp & B Akkermans (eds) *Cases, materials and text on property law. Ius commune casebooks for the common law of Europe* (2012) 37 53.

[75] B Akkermans, V Sagaert & W Swadling "General issues: Setting the scene" in S van Erp & B Akkermans (eds) *Cases, materials and text on property law. Ius commune casebooks for the common law of Europe* (2012) 37 53-54.

[76] B Akkermans, V Sagaert & W Swadling "General issues: Setting the scene" in S van Erp & B Akkermans (eds) *Cases, materials and text on property law. Ius commune casebooks for the common law of Europe* (2012) 37 54.

Ownership was fragmented and numerous individuals were able to hold various kinds of ownership rights with regard to the same property at the same time.[77] Numerous persons had land rights to the extent that each person could be regarded as an 'owner'. Many types of ownership were recognised.[78] The feudal system was abolished on the continent of Europe as a result of the French Revolution.[79] Before the French Revolution, concepts originating from the feudal system were reformulated on the European continent and the concepts were reformulated in Roman law terminology. This was due to the study of rediscovered Roman law sources. This eventually led to a concept of *duplex dominium* to explain that both the lord as well as the tenant had ownership rights with regard to the land. After the French Revolution, the notion of ownership became a unitary concept, at the top of all other (absolute) rights. The effect of the abolition of feudalism is illustrated by the move away from the medieval proliferation of fragmented land rights towards a unified and absolute right of ownership.[80] It was this unified and absolute right of ownership that was established by means of the adoption of a *numerus clausus* of real rights.

---

[77] AJ van der Walt *The law of servitudes* (2016) 25.

[78] B Akkermans, V Sagaert & W Swadling "General issues: Setting the scene" in S van Erp & B Akkermans (eds) *Cases, materials and text on property law. Ius commune casebooks for the common law of Europe* (2012) 37 54.

[79] B Akkermans, V Sagaert & W Swadling "General issues: Setting the scene" in S van Erp & B Akkermans (eds) *Cases, materials and text on property law. Ius commune casebooks for the common law of Europe* (2012) 37 54. See also KGC Reid *The abolition of feudal tenure in Scotland* (2003).

[80] B Akkermans & W Swadling "Types of property rights – immovable and movables (Goods)" in S van Erp & B Akkermans (eds) *Cases, materials and text on property law. Ius commune casebooks for the common law of Europe* (2012) 211 362; AJ van der Walt *The law of servitudes* (2016) 24. The feudal system exists nominally in English law. However, it plays less of a role in modern day than in civil law systems. THD Struycken *De numerus clausus in het goederenrecht* (2007) 120-240; B Akkermans *The principle of numerus clausus in European property law* (2008) 6: The real discussion regarding the *numerus clausus* principle as a basic principle of property law originated in the early 20th century German legal thinking. B Akkermans *The principle of numerus clausus in European property law* (2008) 6: Von Savigny (a German jurist and historian) had a theory on *Vermögensrecht*, which was adopted in the German *Bürgerliches Gesetzbuch* (BGB), in which the law of property and the law of obligations form separate and distinct parts of the law. Other forms of property rights were regarded as rights lesser than the right of ownership (limited real rights) but it still had third-party effect as it could be enforced against the original party to the contract or her successors in title. The German Civil Code limited the number and content of property rights due to the third-party effect and due to the fact that the purpose was to protect the newly created unitary and absolute right of ownership. The law of property's foundations have been taken from Roman law in which the most all-encompassing property right was a unitary and absolute right of ownership. Absoluteness of ownership in this context does not refer to the question of whether the entitlements of ownership are inherently restricted; this is because ownership was never absolute in the sense of unrestricted in the period of medieval law. This is also seen in Bartolus's qualification of his definition of ownership which reads: Ownership is the right to completely dispose of a corporeal unless it is prohibited by law. See *D* 41 2 17 1 n4. Van der Walt explains that split ownership can never be absolute due to the rights of multiple owners that limit each other. Ownership is only absolute to the extent that it is enforceable against the world, which is only possible if ownership is a unitary right. See AJ van der Walt *The law of servitudes* (2016) 24 in footnote 61; P Dhliwayo *A constitutional analysis of access rights that limit landowners' right to exclude* LLD dissertation Stellenbosch University (2015) 89-99.

The purpose of the eradication of the medieval system of fragmented land rights was to free users of land from the fragmented feudal land hierarchy and to safeguard greater certainty for their land rights.[81]

The English common law, similar to the civil law, recognises a *numerus clausus* of property rights and regards it as a fundamental principle of the discipline.[82] A right that is therefore not recognised in the closed list of property rights is regarded as ineffective because it only binds individuals involved in its creation. A right falling outside of this list, would be a personal right, which will only be binding on its grantor.[83] Anti-fragmentation[84] mechanisms, such as the *numerus clausus* principle, guarantee that the limited use rights that an owner is entitled to create, do not contribute to a reintroduced erosion or fragmentation of ownership.[85] Hence, the necessity for the distinction between property rights and personal rights. The *numerus clausus* principle also serves the purpose of preventing ownership of land from being burdened with an excess of overlapping rights binding all successors in title.[86] It is important to take note that the *numerus clausus* principle does not as such resist the creation of new types of property rights, provided that these new types remain within the set of pre-defined

[81] AJ van der Walt *The law of servitudes* (2016) 24-25, see also footnote 63: Fragmented ownership exists when a legal system acknowledges more than one kind of ownership that can be held simultaneously by various individuals.
[82] B Akkermans & W Swadling "Types of property rights – immovable and movables (Goods)" in S van Erp & B Akkermans (eds) *Cases, materials and text on property law. Ius commune casebooks for the common law of Europe* (2012) 211 302.
[83] B Akkermans & W Swadling "Types of property rights – immovable and movables (Goods)" in S van Erp & B Akkermans (eds) *Cases, materials and text on property law. Ius commune casebooks for the common law of Europe* (2012) 211 302.
[84] Feudalism entailed the fragmentation or erosion of ownership. A fragmented land rights regime is characterised by a proliferation of land burdens, several of which could be classified as 'ownership'. The terminology of anti-fragmentation constitutes the resistance against the fragmentation or erosion of ownership and support for the absoluteness of ownership as a unitary right that is not split up between different persons and that can therefore be enforced *erga omnes*. See KGC Reid *The abolition of feudal tenure in Scotland* (2003) 1-21; B Akkermans, V Sagaert & W Swadling "General issues: Setting the scene" in S van Erp & B Akkermans (eds) *Cases, materials and text on property law. Ius commune casebooks for the common law of Europe* (2012) 37 53-65, AJ van der Walt *The law of servitudes* (2016) 62.
[85] AJ van der Walt *The law of servitudes* (2016) 26. See AJ van der Walt "*Novel servitudes Liber Amicorum – essays in honour of JC Sonnekus Sakereg*" 2017 *Tydskrif vir die Suid-Afrikaanse Reg* 408 408-411.
[86] CG van der Merwe "*Numerus clausus* and the development of new real rights in South Africa" (2002) 119 *South African Law Journal* 802 803.

boundaries.[87] The criteria that establish the content of a property right differ based on the specific property right in question.[88]

### 2 3 2 Conclusion

The main purpose of the *numerus clausus* principle is to achieve predictability, promote legal certainty and transparency in the law of property as central values of the post-feudal scheme of rights. This is because it limits the amount of rights, restricts the content of real rights and it sets out fixed rules that determine how real rights can be created, transferred and extinguished.[89]

From the discussion above, it appears that the *numerus clausus* principle in general will not provide a barrier for the creation of a novel category of servitudes, like trading servitudes in South African law. According to the *numerus clausus* principle, when an individual wishes to create a property right, she must select from the already available types of property rights.[90] Servitudes are already recognised as a category of limited real rights. Therefore, creating a novel category of servitudes pertaining to trading rights should not be problematic, provided that the essential criteria for the creation of a praedial or personal servitude are complied with within such a potential novel category of servitude.[91]

---

[87] B Akkermans "The *numerus clausus* of property rights" 2015 *SSRN* at <*http://ssrn.com/abstract=2693667*> (25 August 2016) 1 8.

[88] B Akkermans, V Sagaert & W Swadling "General issues: Setting the scene" in S van Erp & B Akkermans (eds) *Cases, materials and text on property law. Ius commune casebooks for the common law of Europe* (2012) 37 65.

[89] CG van der Merwe *Sakereg* 2 ed (1989) 11; CG van der Merwe "*Numerus clausus* and the development of new real rights in South Africa" (2002) 119 *South African Law Journal* 802 802; AJ van der Walt *The law of servitudes* (2016) 63 cites S van Erp "A *numerus quasi-clausus* of property rights as a constitutive element of future European property law?" in K Boele-Woelki, CH Brants & GJW Steenhoff (eds) *Het plezier van de rechtsvergelijking. Opstellen over unificatie en harmonisatie van het recht in Europa aangeboden aan prof mr EH Hondius* (2003) 39-52 text accompanying footnote 24; B Akkermans, V Sagaert & W Swadling "General issues: Setting the scene" in S van Erp & B Akkermans (eds) *Cases, materials and text on property law. Ius commune casebooks for the common law of Europe* (2012) 37 75-95; B Akkermans & W Swadling "Types of property rights – immovable and movables (Goods)" in S van Erp & B Akkermans (eds) *Cases, materials and text on property law. Ius commune casebooks for the common law of Europe* (2012) 211 362-363.

[90] B Akkermans, V Sagaert & W Swadling "General issues: Setting the scene" in S van Erp & B Akkermans (eds) *Cases, materials and text on property law. Ius commune casebooks for the common law of Europe* (2012) 37 69.

[91] In England a right to deposit trade goods on another individual's land had been recognised as being an easement. In this regard, see *Dyce v Lady Hay* (1852) 1 Macq 305. See also Voet 8 3 12. Chapter 3, 4 and 5 will show that not all trading rights have the potential of being acknowledged as praedial

South Africa has not adopted the *numerus clausus* principle. However, South Africa has strict laws in place to prohibit the proliferation of burdens on land when potential novel categories of real rights are to be created. The subsequent section will explain how South African law reaches the same goal that the *numerus clausus* serves in other legal systems, namely to restrict the creation of overlapping or fragmented rights in land. The section will also briefly consider the benefits of not having a strict *numerus clausus* principle in place. The following section will entail a discussion of South Africa's doctrinal and statutory framework[92] and the criteria for the development of novel limited real rights. The discussion will be in relation to the question whether trading rights could be constituted as a potential novel category of servitudes within South Africa's current framework. The section will also discuss the problems that the parameters provided by South African law may create with regard to the creation of a novel category of real rights.

## 2 4 Statutory and doctrinal framework in South African law

### 2 4 1 Introduction

The freedom of testation and contract are not restricted by a *numerus clausus* of real rights in South Africa.[93] As a result, a testator or contracting party may create novel burdens on their land in wills, contracts of sale, and deeds of transfer as well as servitude and mortgage agreements.[94] Nonetheless, a proliferation of rights on land is not encouraged. For that reason, South African law requires that registration in the deeds registry takes place in terms of section 63(1) of the Deeds Registries Act when a limited real right in immovable property is created or transferred.[95] Section 63(1) provides that only real rights burdening land should be registered. Legal systems such as South Africa that do not recognise the *numerus clausus* principle have strategies in

servitudes especially if the *utilitas* requirement is not complied with. The *utilitas* requirement is one of the essential requirements that should be complied with to establish a praedial servitude.

[92] Statutory framework primarily refers to the Deeds Registries Act 47 of 1937. However, there are other statutes that potentially could form part of the framework regulating real rights in South Africa for instance, the Alienation of Land Act 68 of 1981 and the Subdivision of Agricultural Land Act 70 of 1970. An extensive analysis of these two legislation will not form part of the discussion.

[93] MJ de Waal "Identifying real rights in South African law" in S Bartels & M Milo (eds) *Contents of real rights* (2004) 83 84.

[94] CG van der Merwe "The law of property, the concept of property and real rights" in F du Bois (ed) *Wille's principles of South African law* 9 ed (2007) 405 434.

[95] PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* 5 ed (2006) 65.

place to guarantee that the uniformity and enforceability of real rights in land are not eroded by an unrestricted proliferation of land burdens.[96] Important principles and doctrines of the law of servitude that are entrenched in South African law such as the *utilitas* principle and the civil law principles of praediality[97] are instruments that attempt to restrict excessive or dysfunctional fragmentation of property rights in order to guarantee the absoluteness and security of land rights.[98] Therefore, it can be rightfully said that even though South African law does not adhere to the *numerus clausus* principle in relation to real rights, the South African legal system reveals a cautious approach with regard to recognising new real rights in land outside of the existing traditional categories.[99] Akkermans argues that 'open systems' such as South Africa do adhere to the idea of a *numerus clausus* of property rights because the creation of new real rights occurs in South African property law subject to strict legal requirements such as the intention and subtraction from *dominium* tests.[100]

South African law has in the past recognised new real rights in land outside the traditional categories. An overview of case law and academic literature regarding the creation of new real rights shows that servitudes are one of the most commonly accepted categories of limited real rights in land in which the courts have developed new real rights.[101] Apart from praedial servitudes of trek path and outspan, South African law also acknowledges the servitude of 'market square', the servitude of 'submersion', the servitude of commonage, the servitude of water storage as well as new types of personal servitudes (*servitutes irregulares*). These categories of servitudes are examples of newly developed, uniquely South African servitudes indicating the ability of South African law to accommodate trading servitudes.[102]

---

[96] AJ van der Walt *The law of servitudes* (2016) 27.
[97] See chapter 3 part 3 2 2.
[98] AJ van der Walt *The law of servitudes* (2016) 28. See also BWF Depoorter & F Parisi "Fragmentation of property rights: A functional interpretation of the law of servitudes" (2003) 3 *Global Jurist Frontiers* 1-41. See specifically chapter 3.
[99] CG van der Merwe "*Numerus clausus* and the development of new real rights in South Africa" (2002) 119 *South African Law Journal* 802 802.
[100] B Akkermans "The numerus clausus of property rights" 2015 *SSRN* at <*http://ssrn.com/abstract=2693667*> (25 August 2016) 1 5.
[101] CG van der Merwe "*Numerus clausus* and the development of new real rights in South Africa" (2002) 119 *South African Law Journal* 802 802-815; AJ van der Walt "*Novel servitudes Liber Amicorum – Essays in honour of JC Sonnekus Sakereg*" 2017 *Tydskrif vir die Suid-Afrikaanse Reg* 408 408-420.
[102] CG van der Merwe *Sakereg* 2 ed (1989) 507; CG van der Merwe "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2 ed (2010) para 569; CG van der Merwe "*Numerus clausus* and the development of new real rights in South Africa" (2002) 119 *South African Law Journal* 802 804. In *National Stadium SA (Pty) Ltd and Others v Firstrand Bank Ltd* 2011 (2) SA 157 (SCA) a personal

These novel servitudes were created, because they comply with the general requirements of section 63(1) of the Deeds Registries Act and the criteria for the creation of a novel real right as developed in case law. To establish whether a right or condition with regard to land is real and registrable, two criteria are taken into consideration by the courts.[103] Firstly, the intention of the parties creating a limited real right must be to bind not only the current owner of the land, but also her successors in title. Secondly, the right must be of such a nature that it results in a subtraction from the *dominium* of the land against which it is to be registered. These two criteria will be discussed in the subsequent section.

### 2 4 2 Criteria for the recognition of new categories of real rights

#### *2 4 2 1 Intention test*

The first criterion applied by the courts is to determine whether the intention of the parties to the agreement is to bind the owner of the land in her capacity as landowner and not in her personal capacity.[104] If the parties who established the limitation had the intention of only binding the present landowner in her personal capacity, the right will not be acknowledged as a real right.[105] Consequently, it will not be registrable, even if it has the effect of resulting in a subtraction from the *dominium* of the land concerned.[106] The intention should be to bind the owner of the land in her capacity as owner of the land and not in her personal capacity.[107] The intention to bind only the present landowner in her personal capacity is illustrated by the court's decision in *Nel v Commissioner for Inland Revenue*.[108] In this case Nel donated and transferred farms

servitude was created in favour of First National Bank, to name a soccer stadium erected with financing obtained from it.

[103] CG van der Merwe *Sakereg* 2 ed (1989) 70-71; CG van der Merwe "Rights in land" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 14 part 1 2 ed (2010) para 7; PJ Badenhorst "Registrability of rights in the deeds registry: The twofold test revisited" (2018) 29 *Stellenbosch Law Review* 220 221.

[104] PJ Badenhorst "Registrability of rights in the deeds registry: The twofold test revisited" (2018) 29 *Stellenbosch Law Review* 220 223.

[105] *Fine Wool Products of SA Ltd & Another v Director of Valuations* 1950 (4) SA 490 (EC) 500-501, 513; *Coetzee v Malan* 1979 (1) SA 377 (O).

[106] CG van der Merwe *Sakereg* 2 ed (1989) 70-83.

[107] CG van der Merwe *Sakereg* 2 ed (1989) 71; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* 5 ed (2006) 57; H Mostert & A Pope (eds), P Badenhorst, W Freedman, J Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 54.

[108] 1960 (1) SA 227 (A). See CG van der Merwe *Sakereg* 2 ed (1989) 71-72; CG van der Merwe "Things, time, time-sharing and shareblocks" in WA Joubert, JA Faris & LTC Harms (eds) *The law of South Africa* vol 27 2 ed (2014) para 64.

and an urban plot of land to his minor son. The transfer made by Nel was subject to the condition that after his death, his son had to register by notarial deed a right of usufruct in favour of his mother in respect of the urban erf and had to pay her an amount of £20. The widow as executrix of the estate applied to court for a declaratory order that the usufruct in her favour and the obligation to pay the monthly sum amounted to a 'usufructuary or like interest' and that it was therefore deductible from estate duty in terms of the Administration of Estates Act.[109] The Appellate Division accepted Mrs Nel's argument in respect of the usufruct but refused to do so with regard to the monthly payment. Ramsbottom JA stipulated that it was never the intention of the deceased to bind the land directly but only to impose a personal obligation on his son to pay his mother a monthly amount of money after his death.[110] This case confirms that it must be the intention of the parties to bind the land itself so that subsequent owners will also be obliged to honour the condition.[111] It is important to take note that the intention test can not magically transform a personal right into a real right.[112] It is preferable that the intention test should only be used once the application of the subtraction from the *dominium* test proves that a particular right in question is capable of becoming a real right.[113]

### *2 4 2 2 The application of the subtraction from the* dominium *test*

The courts also apply a second criterion, namely the subtraction from the *dominium* test, to determine whether a right or condition is a limited real right and therefore registrable.[114] This second criterion is based on the idea that a limited real right diminishes the owner's *dominium* over her property by providing the holder, who is ordinarily entitled to use the property, with certain entitlements that are normally inherent in ownership, or which have the effect of preventing the owner from exercising her right of ownership to its full capacity. The subtraction from the *dominium* test has

[109] 24 of 1913.
[110] 1960 (1) SA 227 (A) 234-235.
[111] CG van der Merwe "The law of property, the concept of property and real rights" in F du Bois (ed) *Wille's principles of South African law* 9 ed (2007) 405 434.
[112] PJ Badenhorst "Registrability of rights in the deeds registry: The twofold test revisited" (2018) 29 *Stellenbosch Law Review* 220 223.
[113] PJ Badenhorst "Registrability of rights in the deeds registry: The twofold test revisited" (2018) 29 *Stellenbosch Law Review* 220 223.
[114] CG van der Merwe *Sakereg* 2 ed (1989) 70-83.

been applied by South African courts since 1893.[115] In this regard, courts have grappled with the question of whether specific conditions amount to a real or personal right.[116] These cases illustrate the court's approach in the application of the subtraction from the *dominium* test. It also highlights the unreliability of the test in accurately identifying a right as real.

In *Ex parte Geldenhuys*[117] the application of the subtraction from the *dominium* test led to the recognition of a new category of real rights.[118] In a mutual will of Geldenhuys and his wife, land was bequeathed to the children of the marriage in equal shares subject to the usufruct of the surviving testator or testatrix.[119] The testatrix died and the applicant, who was the surviving testator and the executor of the deceased's testatrix's estate, applied to the court for an order instructing the Registrar of Deeds to register the lands in undivided shares in the names of the children of the marriage subject to the conditions of the mutual will. A further condition provided that the child who drew the portion comprising a homestead would be obliged to pay a sum of money to the others. The Registrar of Deeds had no objection to the transfer of the property to the children in undivided shares. However, the Registrar of Deeds refused to register the conditions with regard to the method of subdivision, namely the drawing of lots and the payment by the child who obtains the homestead, arguing that these conditions did not establish real rights in land. The Registrar of Deeds argued that the conditions create purely 'personal rights' and that the conditions, even if registered, would only be binding on the legatees and not on any transferees to whom the legatees might transfer their undefined shares before partition.[120] In order to determine whether these conditions amount to a real right or personal right, the court formulated the test as follows: [121]

---

[115] *Consistory of Steytlerville v Bosman* (1893) 10 SC 67, 69; CG van der Merwe *Sakereg* 2 ed (1989) 73. See also PJ Badenhorst "Registrability of rights in the deeds registry: The twofold test revisited" (2018) 29 *Stellenbosch Law Review* 220 223.
[116] *Ex parte Geldenhuys* 1926 OPD 155; *Lorentz v Melle and Others* 1978 (3) SA 1044 (T); *Pearly Beach Trust v Registrar of Deeds* 1990 (4) SA 614 (C) 615.
[117] 1926 OPD 155.
[118] *Ex parte Geldenhuys* 1926 OPD 155; CG van der Merwe *Sakereg* 2 ed (1989) 73; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* 5 ed (2006) 57-58.
[119] *Ex parte Geldenhuys* 1926 OPD 155 162.
[120] *Ex parte Geldenhuys* 1926 OPD 155 162.
[121] 1926 OPD 155 164; AJ van der Walt "Personal rights and limited real rights: A historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *Tydskrif vir Heedendaagse Romeins-Hollandse Reg* 170 180-181; *Denel (Pty) Ltd v Cape Explosive Works Ltd and Another* 1999 (2) SA 419 (T) 435.

> "One has to look not so much to the right, but to the correlative obligation. If that obligation is a burden upon the land, a 'subtraction from the *dominium*', the corresponding right is real and registrable; if it is not such an obligation, but merely an obligation binding on some person or other, the corresponding right is a personal right, or right in *personam*, and it cannot as a rule be registered."

Therefore, if the obligation has the effect of binding only a particular party, the corresponding right is a personal right and cannot be registered.[122] This test assumes that if another person holds a real right with regard to the owner's property, it has the effect of subtracting from the owner's normal powers of use, enjoyment, alienation or disposal, which are inherent to ownership.[123] Such a right would bind not only the current owner but all subsequent owners of the land as well. Thus, if a right has such an effect, it will be regarded as being real and registrable.[124]

The court considered the obligation to subdivide and distribute the land by the drawing of lots, and held that this obligation has the effect of subtracting from the normal right of the co-owners to dispose of their undivided common property since co-owners can usually determine when and how they want to distribute the property among themselves.[125] In this specific case, the date of the distribution and the manner of distribution were prescribed, with the result that the normal common law rights of the co-owners have been diminished by the obligation.

Secondly, the court focused on the obligation of one child to pay a sum of money to the others and decided that the payment of the sum of money by one child to the others was an obligation resting on that one child in his personal capacity, without diminishing his ownership of the land in any way.[126] However, the court allowed registration of the condition to pay a sum of money with the condition that the land should be divided and distributed among the children by drawing lots due to the fact that the two conditions were closely related.[127] Very importantly, the co-registration was authorised for practical purposes. It did not have the effect of transforming the

---

[122] *Ex parte Geldenhuys* 1926 OPD 155 164; AJ van der Walt "Personal rights and limited real rights: A historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *Tydskrif vir Heedendaagse Romeins-Hollandse Reg* 170 180-181.
[123] MJ de Waal "*Numerus clausus* and the development of new real rights in South African law" (revised version of a paper read at staff seminars at the University of Nijmegen on 21 June 1999 and Maastricht University on 22 June 1999).
[124] MJ de Waal "*Numerus clausus* and the development of new real rights in South African law" (revised version of a paper read at staff seminars at the University of Nijmegen on 21 June 1999 and Maastricht University on 22 June 1999).
[125] *Ex parte Geldenhuys* 1926 OPD 155 165.
[126] *Ex parte Geldenhuys* 1926 OPD 155 165.
[127] *Ex parte Geldenhuys* 1926 OPD 155 164; AJ van der Walt *The law of servitudes* (2016) 386.

payment-of-money condition into a real right.[128] This case creates the impression that a right or condition which relates to the payment of an amount of money will not be regarded as a real right that is registrable in terms of section 63(1) of the Deeds Registries Act. This is the case even if the money is derived from the use of land, and even if the condition seems to create a servitude-like right, which allows a beneficiary the benefit of a profit.[129]

In *Lorentz v Melle and Others*[130] the question again had to be answered whether the obligation to pay money arising from the sale of townships registered against the title of land were real rights or only personal rights. Lorentz and Van Boeschoten executed a notarial deed initially in which they agreed to subdivide a part of the property. Their agreement stated that 'if Lorentz lays out a township on his portion, Van Boeschoten shall have one-half of the net profits arising from the sale of such township payable from time to time as each lot or erf is sold […]'. This right was also stipulated in favour of Lorentz over the land registered in Van Boeschoten's name. Melle, the successor in title of Van Boeschoten, intended to sell her portion of the land to a company. She sought a declaratory order from the court that the township clause only created personal rights between Lorentz and Van Boeschoten. The court *a quo* granted the order. On appeal Lorentz argued that the agreement created real rights in the form of a praedial servitude and that this was what the parties had intended and indeed achieved. He argued that the condition bound all successors in title of the original parties to the contract.

The court held that the obligation to pay money arising from the sale of the townships does subtract from the *dominium*.[131] Nestadt J asserted that the particular right and obligation is essentially a personal right sounding in money and cannot be equated to a servitude. However, Nestadt J stated that even though the obligation does subtract from the *dominium*, it cannot be registrable. This is because the obligation to pay money attaches of necessity not to the land but merely to the owner of the land. The owner's rights are curtailed but not with regard to his enjoyment of the land in the physical sense. Nestadt J emphasised that if a right is personal in nature it cannot be

[128] AJ van der Walt *The law of servitudes* (2016) 386.
[129] AJ van der Walt *The law of servitudes* (2016) 386.
[130] *Lorentz v Melle and Others* 1978 (3) SA 1044 (T); AJ van der Walt "Personal rights and limited real rights: A historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *Tydskrif vir Heedendaagse Romeins-Hollandse Reg* 170 195-196.
[131] *Lorentz v Melle and Others* 1978 (3) SA 1044 (T) 1052.

transformed into a real right by the intention of the parties.[132] It remains to be established what the effect of these statements of the court are. It is clear that the court narrowed the subtraction test to focus on the restriction that a limited real right should place on the owner's enjoyment of her property *in the physical sense*.[133] This is in contrast to the *Geldenhuys* decision because the court in *Lorentz* found that the obligation to pay money does result in a subtraction from the owner's *dominium*, but argued that it does not restrict his rights in relation to the enjoyment of the land in the physical sense. On this basis, the two cases are clearly distinguishable.

Van der Walt argues that the argument in *Lorentz* makes nonsense of the subtraction from the *dominium* test, because an obligation either does amount to such a subtraction (in which case the corresponding right is real), or it does not (in which case the corresponding right is personal).[134] He argues furthermore that in terms of the subtraction test an obligation that does subtract from the *dominium* without the corresponding right being real is unthinkable. De Waal similarly argues that this case illustrates the essential unreliability of the subtraction from the *dominium* test in properly identifying a right as real.[135] The decision in *Lorentz v Melle*[136] can be regarded as a turning point in respect of the distinction between real and personal rights.[137] Nestadt J acknowledged that an uncritical application of the test could have constrained it to reach a different conclusion on the facts of the case before it.[138] In light of this decision it appears that a condition that places an obligation on an owner of land to pay an amount of money to another individual could never qualify as a real right capable of registration, even if it purports to subtract from the owner's *dominium* because such an obligation will never burden the land in the physical sense.[139]

---

[132] *Lorentz v Melle and Others* 1978 (3) SA 1044 (T) 1050.
[133] *Lorentz v Melle and Others* 1978 (3) SA 1044 (T) 1052; AJ van der Walt *The law of servitudes* (2016) 386-387.
[134] AJ van der Walt *Law of property casebook for students* 8 ed (2016) 26.
[135] MJ de Waal "*Numerus clausus* and the development of new real rights in South African law" (revised version of a paper read at staff seminars at the University of Nijmegen on 21 June 1999 and Maastricht University on 22 June 1999).
[136] 1978 (3) SA 1044 (T).
[137] CG van der Merwe *Sakereg* 2 ed (1989) 76.
[138] *Lorentz v Melle and Others* 1978 (3) SA 1044 (T) 1052; MJ de Waal "*Numerus clausus* and the development of new real rights in South African law" (revised version of a paper read at staff seminars at the University of Nijmegen on 21 June 1999 and Maastricht University on 22 June 1999).
[139] AJ van der Walt *The law of servitudes* (2016) 387.

In *Pearly Beach Trust v Registrar of Deeds*,[140] yet another perspective to the subtraction test is provided. In this case, the applicant sought an order in terms of section 3(1) of the Deeds Registries Act, directing the Registrar of Deeds to register a condition that provides that a third party is entitled to receive one third of the consideration received in the event that the property is expropriated or disposed of to any authority with the power to expropriate. The applicant approached the court because the Registrar of Deeds refused to register the deed insofar as it contains such condition. The refusal to register the condition by the Registrar of Deeds was based on section 63(1) of the Deeds Registries Act. Section 3(1)(r) of the Act requires the Registrar to register 'any real right, not specifically referred to in this subsection…' but section 63(1), a general provision relating to the rights in immovable property, provides that no condition in a deed purporting to create a personal right which does not restrict the exercise of a right of ownership with regard to immovable property, shall be registered.[141]

The Registrar argued that in order for a right to be registrable, it must have the effect of subtracting from the *dominium* of the land.[142] According to the Registrar the right of successive owners of the land to grant mineral rights or to sell the land was not restricted. There was only an obligation for them to pay over to a third party a share of the proceeds of a grant, sale or expropriation.[143] The court rejected the argument of the Registrar in objection to registration. King J held that one of the entitlements of ownership is the right of alienation and if this right is limited to the extent that the owner is prohibited from obtaining the full fruits of the disposition, his rights of ownership will

[140] *Pearly Beach Trust v Registrar of Deeds* 1990 (4) SA 614 (C); AJ van der Walt "Personal rights and limited real rights: A historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *Tydskrif vir die Heedendaagse Romeins Hollandse Reg* 170 170-172; MJ de Waal "*Numerus clausus* and the development of new real rights in South African law" (revised version of a paper read at staff seminars at the University of Nijmegen on 21 June 1999 and Maastricht University on 22 June 1999).
[141] Deeds Registries Act 47 of 1937; *Pearly Beach Trust v Registrar of Deeds* 1990 (4) SA 614 (C) 615.
[142] *Pearly Beach Trust v Registrar of Deeds* 1990 (4) SA 614 (C) 615; AJ van der Walt "Personal rights and limited real rights: A historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *Tydskrif vir Heedendaagse Romeins-Hollandse Reg* 170 170-172; MJ De Waal "*Numerus clausus* and the development of new real rights in South African law" (revised version of a paper read at staff seminars at the University of Nijmegen on 21 June 1999 and Maastricht University on 22 June 1999).
[143] *Pearly Beach Trust v Registrar of Deeds* 1990 (4) SA 614 (C) 615; AJ van der Walt "Personal rights and limited real rights: A historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *Tydskrif vir die Heedendaagse Romeins-Hollandse Reg* 170 170-172; MJ de Waal "*Numerus clausus* and the development of new real rights in South African law" (revised version of a paper read at staff seminars at the University of Nijmegen on 21 June 1999 and Maastricht University on 22 June 1999).

be regarded as being restricted.[144] This would presumably be sufficient to prove a subtraction from the *dominium*. The court in *Pearly Beach* allowed registration of the condition on the basis that it created a subtraction from the landowner's *dominium*.[145]

It is difficult to reconcile this decision with the earlier judgment in *Lorentz*.[146] In both these cases the condition entailed payment of proceeds received upon disposal of the land to a third party. However, in the *Pearly Beach* case, registration was allowed and in the *Lorentz* case it was not allowed. Clearly one of these two decisions should be regarded as wrong.[147]

Sonnekus[148] mentions correctly that a different test should have been employed in *Pearly Beach*.[149] He reasons that even if the argument of the Registrar of Deeds was correct, such an argument could have been reached without the application of the subtraction from the *dominium* test.[150] In this regard, the subtraction from the *dominium* test has been part of the South African law for decades, but the test serves no guarantee regarding its scientific durability. Arguably, the following measures could have been used to determine whether the condition in question was a real right.[151] Firstly, the primary difference between a real and personal right is located in the different nature of the objects of the rights. A real right is a right to a thing. A personal right is a right to claim performance from another person. If a right provides the right holder with entitlements to a thing, it will be a real right provided that it is in respect of a thing. If the right provides the right holder with the entitlement to claim from another party to carry out a certain act, it is a personal right. In the present case the right holder

---

[144] *Pearly Beach Trust v Registrar of Deeds* 1990 (4) SA 614 (C) 617; AJ van der Walt "Personal rights and limited real rights: A historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *Tydskrif vir die Heedendaagse Romeins-Hollandse Reg* 170 170-172; MJ de Waal "*Numerus clausus* and the development of new real rights in South African law" (revised version of a paper read at staff seminars at the University of Nijmegen on 21 June 1999 and Maastricht University on 22 June 1999).

[145] *Pearly Beach Trust v Registrar of Deeds* 1990 (4) SA 614 (C) 617; AJ van der Walt *The law of servitudes* (2016) 387.

[146] *Lorentz v Melle and Others* 1978 (3) SA 1044 (T) 1052; MJ de Waal "*Numerus clausus* and the development of new real rights in South African law" (revised version of a paper read at staff seminars at the University of Nijmegen on 21 June 1999 and Maastricht University on 22 June 1999).

[147] MJ de Waal "*Numerus clausus* and the development of new real rights in South African law" (revised version of a paper read at staff seminars at the University of Nijmegen on 21 June 1999 and Maastricht University on 22 June 1999).

[148] JC Sonnekus "Saaklike regte of vorderingsregte? – Tradisionele toetse en 'n *petitio principii*" 1991 *Tydskrif vir die Suid-Afrikaanse Reg* 173 179.

[149] *Pearly Beach Trust v Registrar of Deeds* 1990 (4) SA 614 (C).

[150] JC Sonnekus "Saaklike regte of vorderingsregte? – Tradisionele toetse en 'n *petitio principii"* 1991 *Tydskrif vir die Suid-Afrikaanse Reg* 173 177.

[151] JC Sonnekus "Saaklike regte of vorderingsregte? – Tradisionele toetse en 'n *petitio principii*" 1991 *Tydskrif vir die Suid-Afrikaanse Reg* 173 179-180.

did not receive any entitlements to perform any action in respect of the land without the assistance of another. The condition in *Pearly Beach* provided the right holder with a right to claim payment of money depending on the realisation of a particular uncertain future event. The object of the holder's right was that the other individual to the agreement had to render a specific performance. The object of the right was not (at least not directly) with regard to the land as a thing and should therefore not have been regarded as a real right.

Furthermore, a real right is established by means of original acquisition[152] (for example *occupatio*) or by means of derivative acquisition[153] (for example delivery in the case of movables or registration in the case of immovable property), whereas a personal right is established *ex contractu*, *ex delicto* or *ex variis causarum figuris*.[154] In the present case it is clear that the beneficiary's rights had to be established *ex contractu* and that registration played no role in the establishment of these rights. The registration was of importance to the contracting party because the party aimed to enforce the rights against uninvolved third parties as future successors in title. On this basis, Sonnekus argues that since the contractual agreement only dealt with personal rights, the registration of the rights had no influence on the enforceability against third parties who were not parties to the agreement. The mere fact that a personal right is wrongfully registered as a real right, does not place any obligations on third parties to render a specific performance.[155] Sonnekus's argument is convincing as his test provides a logical way to distinguish between a real right and a personal right. His theory provides a clearer approach to determine when a right is real or personal. The suggestion provided by Sonnekus could have been applied in the *Geldenhuys*, *Lorentz* and *Pearly Beach* judgments without applying the subtraction from *dominium* test. If the test as provided by Sonnekus was applied in *Geldenhuys* and *Lorentz*, the outcome of the decisions would arguably have still been the same, namely that an obligation to

[152] See PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* 5 ed (2006) 71, 137-200: The original acquisition of a real right is comprised by a unilateral act or a series of such acts by the individual who acquires it. In other words it is newly created without the co-operation of a predecessor in title.

[153] See PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* 5 ed (2006) 71, 201-239: The derivative acquisition of a real right is comprised by a bilateral transaction such as where a real right already exists and is merely transferred from one individual to another or where the right is created with the co-operation of a predecessor in title.

[154] JC Sonnekus "Saaklike regte of vorderingsregte? – Tradisionele toetse en 'n *petitio principii*" 1991 *Tydskrif vir die Suid-Afrikaanse Reg* 173 180.

[155] JC Sonnekus "Saaklike regte of vorderingsregte? – Tradisionele toetse en 'n *petitio principii*" 1991 *Tydskrif vir die Suid-Afrikaanse Reg* 173 180. Sonnekus relies on *Lorentz v Melle and Others* 1978 (3) SA 1044 (T) 1058 to substantiate his argument in this regard.

pay money has the nature of a personal right and not a real right. The application of the test of Sonnekus to *Pearly Beach* would have changed the initial outcome of the decision. This is because a condition providing that a third party is entitled to receive one third of fruits in the event that the property is expropriated, would have rightfully been regarded as a personal right and not a limited real right.

The *Cape Explosive Works Ltd and Another v Denel (Pty) Ltd and Others*[156] case differs from the *Geldenhuys*, *Lorentz* and *Pearly Beach* judgments as it dealt with restrictions on the use and exploitation of land and not the obligation to pay money to another. The case is nonetheless interesting because it adds further understanding to the subtraction from the *dominium* test. The main issue that had to be decided on appeal was whether certain conditions registered in a title deed and erroneously omitted from subsequent title deeds were binding on the present owner of the relevant property.[157] In 1973 the first appellant, Cape Explosive Works Ltd ("Capex") sold two immovable properties to the second respondent, the Armaments Corporation of South Africa Limited ("Armscor"). In terms of a clause of the deed of sale Armscor undertook that the properties would only be used for the development and manufacture of armaments and in terms of another clause, Armscor granted to Capex the first right to repurchase the properties, at a price to be determined in a prescribed manner, in the case where the properties are no longer required for the use set out in the first clause. The restrictions were not applicable to the smaller piece of land. The larger piece of land, which was held by Armscor, was later sold to Denel. The transfer of the larger piece of land to Denel had taken place subject to both conditions. However, in a further transfer, the second clause was omitted, while the first condition applied only to a small portion of the land instead of to the entire property. Denel applied for an order declaring that its ownership of the land was not subject to the second clause. Capex, in a counterapplication, applied for an order directing the Registrar of Deeds to rectify the title documents to include both clauses.

The court had to decide whether a condition in the sale agreement that required the purchaser to inform the seller if the land was no longer used for the stated purpose to enable the seller to exercise its right of first refusal to repurchase the land, could be registered because it amounted to a real right. The court reiterated the principle, which

[156] 2001 (3) SA 569 (SCA). For a discussion of this case, see also PJ Badenhorst "Registrability of rights in the deeds registry: The twofold test revisited" (2018) 29 *Stellenbosch Law Review* 220 225-226.
[157] *Cape Explosive Works Ltd and Another v Denel (Pty) Ltd and Others* 2001 (3) SA 569 (SCA) para 1.

was made clear in *Ex parte Geldenhuys*,[158] that to determine whether a particular right or condition in respect of land is real, two requirements should be complied with.[159] Firstly, the intention of the person creating the real right must be to bind not only the present owner of the land, but also his successors in title, and secondly, the right or condition must be of such a nature that the registration of it results in a subtraction from *dominium* of the land against which it is registered.

In this particular case the intention was to bind both the original purchaser and all its successors in title. Furthermore, the nature of the right regarding notification and repurchase was suited for registration and the creation of a limited real right.[160] Streicher JA also mentioned that the two clauses were dependent on one another and that they could not be separated.[161] Consequently, the two conditions constituted a burden upon the land because the use of the property by its owner was restricted. The conditions were not extinguished simply by the erroneous omission thereof from the subsequent title deeds. South Africa has a negative system of registration where the deeds registry does not necessarily reflect the true state of affairs and third parties cannot place absolute reliance thereon.[162]

The court in *Capex* confirmed the decision in the *Lorentz* case insofar as a real right requires that the condition should diminish the owner's physical use of the land before such a condition could be registered.[163] However, a notable difference between the two cases was that *Lorentz* dealt with the obligation to pay a sum of money and *Capex* did not. Therefore, *Capex* did not address the condition for the payment of a sum of money dispute. Consequently, it does not bring clarity on the conflicting decisions on this point.[164] It was easier for the court in the *Capex* case to follow *Lorentz* in terms of the physical limitation requirement of the subtraction from the *dominium* test, which logically would be more difficult in the context of the obligation to pay a sum

[158] 1926 OPD 155 164.
[159] *Cape Explosive Works Ltd and Another v Denel (Pty) Ltd and Others* 2001 (3) SA 569 (SCA) para 12.
[160] *Cape Explosive Works Ltd and Another v Denel (Pty) Ltd and Others* 2001 (3) SA 569 (SCA) para 15.
[161] *Cape Explosive Works Ltd and Another v Denel (Pty) Ltd and Others* 2001 (3) SA 569 (SCA) para 15.
[162] CG van der Merwe *Sakereg* 2 ed (1989) 342; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 403-405; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* 5 ed (2006) 230-232.
[163] AJ van der Walt *The law of servitudes* (2016) 387.
[164] AJ van der Walt *The law of servitudes* (2016) 387.

of money. In addition, the theory provided by Sonnekus[165] would have led to a similar result because the nature of Capex's right was directly with regard to the land as a thing and therefore a real right.

A more recent case dealing with the subtraction from the *dominium* test is *Cowin v Kyalami Estate Homeowners Association*.[166] A condition of title was registered against the title deeds of an erf in a security estate owned by the third applicant and run and controlled by the first respondent, the Kyalami Estate Homeowners Association. The condition stipulated that the owner of the erf was not entitled to transfer the erf without obtaining a clearance certificate from the Homeowners Association. The legal questions were whether the condition in the title deed of the third applicant gave rise to a real or personal right, whether the first respondent should be regarded as a concurrent creditor in the insolvent estate of the third applicant and whether the fourth respondent should register transfer of the property in the name of the purchaser in compliance with the condition in the title deed.[167]

The court relied on the *Pearly Beach* judgment in which the court found that where an owner was incapable of passing ownership free of encumbrances, his or her ownership was indeed restricted. Therefore, a condition that stipulates that ownership could not pass to a subsequent purchaser unless there had been compliance with such a condition constituted a subtraction from the *dominium* of the land, and the condition was therefore a real, and not a personal, right.[168]

A similar situation arose in the case of *Willow Waters Homeowners Association (Pty) Ltd v Koka NO and Others*,[169] where the court also had to determine whether a condition of title in a title deed of immovable property that prohibited the transfer thereof without a clearance certificate or the consent of the homeowner's association constituted a real or personal right. Furthermore, the court had to assess whether the

[165] JC Sonnekus "Saaklike regte of vorderingsregte? – Tradisionele toetse en 'n *petitio principii*" 1991 *Tydskrif vir die Suid-Afrikaanse Reg* 173 179.
[166] SGHC case no 12/11377, 25 February 2013.
[167] *Cowin NO and Others v Kyalami Estate Homeowners Association and Others* SGHC case no 12/11377, 25 February 2013 para 8.
[168] *Cowin NO and Others v Kyalami Estate Homeowners Association and Others* SGHC case no 12/11377, 25 February 2013 paras 11-17.
[169] 2015 (5) SA 304 (SCA). For a discussion of this case, see also PJ Badenhorst "Registrability of rights in the deeds registry: The twofold test revisited" (2018) 29 *Stellenbosch Law Review* 220 227-229.

embargo remained binding on the Master and trustees of the property owners in sequestration.

The court *a quo* held that the embargo constituted a personal right, which did not have the effect of binding the trustees of an insolvent estate.[170] As a result, the court *a quo* allowed the Registrar to effect transfer of the property without a clearance certificate from the homeowners' association. The Supreme Court of Appeal in turn reiterated that it is a matter of interpretation whether the title condition embodies a personal right or a real right, which specifically restricts the entitlements of ownership.[171] The intention of the parties should be gathered from the terms of the contractual agreement such as the words in their ordinary sense, construed in the light of the relevant and admissible context, including the circumstances in which the contract came into being. According to the Supreme Court of Appeal, statutory embargoes served a vital and legitimate purpose as effective security for debt recovery in respect of municipal service fees and contributions to bodies corporate for water, electricity, rates and taxes.[172] Therefore, the court argued that there was no basis to deprive the association of the protection afforded by the embargo. Furthermore, homeowners associations are compelled to provide services to all their members.[173] Municipalities and bodies corporate enjoy the statutory protection afforded by embargoes.[174] Therefore, it should also extend credit to all the homeowners in their estates without the benefit of requiring security.

The court stated that for a condition to be capable of valid registration as a real right, it must carve out a portion of, or it must take away something from, the

[170] *Willow Waters Homeowners Association (Pty) Ltd v Koka NO and Others* 2015 (5) SA 304 (SCA) para 1.
[171] In *Willow Waters Homeowners Association (Pty) Ltd v Koka NO and Others* 2015 (5) SA 304 (SCA) para 16 the court referred to *National Stadium South Africa (Pty) Ltd & Others v Firstrand Bank Ltd* 2011 (2) SA 157 (SCA).
[172] *Willow Waters Homeowners Association (Pty) Ltd v Koka NO and Others* 2015 (5) SA 304 (SCA) para 25.
[173] *Willow Waters Homeowners Association (Pty) Ltd v Koka NO and Others* 2015 (5) SA 304 (SCA) para 27.
[174] See section 118(3) of the Local Government: Municipal Systems Act 32 of 2000. This provision was declared unconstitutional in *Jordaan and Others v Tshwane Metropolitan Municipality and Others* 2017 (6) SA 287 (CC). This section provides that an amount that is due for municipal services rendered on property will be regarded as a charge upon that property. Furthermore, it states that the charge will enjoy preference over mortgage bond registered against the property. The Constitutional Court held that a municipality cannot hold a new owner of property liable for the historical debt of a previous owner. See also R Brits "Why the security right in section 118(3) of the Local Government: Municipal Systems Act 32 of 2000 is not enforceable against successors in title – a follow-up occasioned by the SCA's *Mitchell* judgment" (2017) 28 *Stellenbosch Law Review* 47-67.

*dominium*.[175] This principle is entrenched in section 63(1) of the Deeds Registries Act 47 of 1937. The method of the subtraction from the *dominium* test was stated by Maya AJ as follows:[176]

> "It is established that ownership comprises a bundle of rights or competencies which include the right to use or exclude others from using the property or to give others rights in respect thereof. One of these rights or competencies is the right to freely dispose of the property, the *ius disponendi*. If that 'right is limited in the sense that the owner is precluded from obtaining the full fruits of the disposition … [then] one of his rights of ownership is restricted.'"

Maya JA relied on the formulation of the subtraction from *dominium* test as applied in *Pearly Beach*[177] where the court held that a right of a third party to receive a third of prospecting money for expropriation (if expropriation of the land should take place) from a transferee or successors in title of the transferee, places a restriction on the owner from obtaining the 'full fruits of the disposition' and, therefore, it constitutes a real right.[178] The court held that the embargo registered against the title deed of the property carved out from the owner's *dominium* by restricting its *ius disponendi*. It subtracted from the *dominium* of the land against which it was registered and was a real right.[179] The problem with the court relying on *Pearly Beach* is that this specific case was not free from judicial and academic criticism. Critics of the *Pearly Beach* judgment correctly argue that the obligation to pay an amount of money constituted a personal right and not a limited real right.[180] Badenhorst rightfully asserts that it is a

---

[175] *Willow Waters Homeowners Association (Pty) Ltd v Koka NO and Others* 2015 (5) SA 304 (SCA) para 21.

[176] *Willow Waters Homeowners Association (Pty) Ltd v Koka NO and Others* 2015 (5) SA 304 (SCA) para 22.

[177] *Pearly Beach Trust v Registrar of Deeds* 1990 (4) SA 614 (C). See also PJ Badenhorst "Registrability of rights in the deeds registry: The twofold test revisited" (2018) 29 *Stellenbosch Law Review* 220 228.

[178] *Pearly Beach Trust v Registrar of Deeds* 1990 (4) SA 614 (C) 617-618. Badenhorst criticises this statement of the court. He states that the formulation of the *dictum* is unfortunate. This is because unlike the English common law, where 'property' or (ownership) is described with reference to the bundle of rights theory, the content of ownership in South African property law is not defined as a bundle of rights but instead, entitlements. The content of ownership as a real right are certain entitlements and not competencies or rights. See PJ Badenhorst "New real rights to land in South Africa: A twofold test" (2015) 4 *Property Law Review* 197 202; PJ Badenhorst "Registrability of rights in the deeds registry: The twofold test revisited" (2018) 29 *Stellenbosch Law Review* 220 228.

[179] *Willow Waters Homeowners Association (Pty) Ltd v Koka NO and Others* 2015 (5) SA 304 (SCA) para 22.

[180] PJ Badenhorst "Registrability of rights in the deeds registry: The twofold test revisited" (2018) 29 *Stellenbosch Law Review* 220 228-229. See also *Denel (Pty) Ltd v Cape Explosive Works Ltd* 1999 (2) SA 419 (T) 437; JC Sonnekus "Saaklike regte of vorderingsregte? – tradisionele toetse en 'n *petitio principii*" 1991 *Tydskrif vir die Suid-Afrikaanse Reg* 173; PJ Badenhorst & PPJ Coetser "The subtraction from the *dominium* test revisited - *Pearly Beach Trust v Registrar of Deeds*" (1991) 24 *De Jure* 375, 385, 386; H Mostert & A Pope (eds), P Badenhorst, W Freedman, J Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 53.

pity that these criticisms were not dealt with by the court in *Willow Waters*.[181] The *Willow Waters* case is another example of the unreliability of the subtraction from *dominium* test.

In general it appears that neither legal dogmatics nor precedent provides a practical approach to distinguishing between real and personal rights.[182] The distinction between real and personal rights depends on the rules of the system and not on their inherent nature. New categories of real rights may in future be created arbitrarily due to the fact that South African law does not recognise a *numerus clausus* of real rights and the courts are left with the task of determining whether a right amounts to a real or personal right. As a result of the possibility that new categories of real rights may be created arbitrarily, Van der Merwe suggests that the time is ripe for the legislature to draw up a complete list of real rights or to recognise new types of real rights when the need arises.[183] If Van der Merwe's views are followed, the problem of legal uncertainty will be addressed, but the current flexibility of the South African law would be sacrificed.[184] However, the problem with too much flexibility may be that if the courts are merely guided by the criteria evident in case law, they may create new real rights as they see fit.[185] This can lead to legal uncertainty as case law already indicates that the subtraction from the *dominium* test does not fulfil its function adequately.[186]

Van der Merwe argues that, until a *numerus clausus* is recognised in South African law, the courts should continue to recognise new real rights on the analogy of existing categories.[187] New categories of real rights should only be recognised when

---

[181] PJ Badenhorst "Registrability of rights in the deeds registry: The twofold test revisited" (2018) 29 *Stellenbosch Law Review* 220 228-229.
[182] CG van der Merwe "Things, time, time-sharing and shareblocks" in WA Joubert, JA Faris & LTC Harms (eds) *The law of South Africa* vol 27 2 ed (2014) para 68.
[183] CG van der Merwe "Things, time, time-sharing and shareblocks" in WA Joubert, JA Faris &LTC Harms (eds) *The law of South Africa* vol 27 2 ed (2014) para 68.
[184] MJ de Waal "*Numerus clausus* and the development of new real rights in South African law" (revised version of a paper read at staff seminars at the University of Nijmegen on 21 June 1999 and Maastricht University on 22 June 1999); MJ de Waal "Identifying real rights in South African law" in S Bartels & M Milo (eds) *Contents of real rights* (2004) 83 97.
[185] MJ de Waal "*Numerus clausus* and the development of new real rights in South African law" (revised version of a paper read at staff seminars at the University of Nijmegen on 21 June 1999 and Maastricht University on 22 June 1999).
[186] MJ de Waal "*Numerus clausus* and the development of new real rights in South African law" (revised version of a paper read at staff seminars at the University of Nijmegen on 21 June 1999 and Maastricht University on 22 June 1999).
[187] CG van der Merwe "Things, time, time-sharing and shareblocks" in WA Joubert, JA Faris & LTC Harms (eds) *The law of South Africa* vol 27 2 ed (2014) para 68.

the need for such rights arises. This raises the question whether it is necessary to consider categorising trading rights as a novel category of servitudes.[188] Policy considerations may play a role in addressing this question.[189] If developments in commerce and society require that a new real right in the form of trading servitudes ought to be created, then the creation of novel rights must be promoted as far as possible,[190] provided that the nature of a praedial or personal servitude is found within them.[191]

### *2 4 2 3 Relevance of case law for the potential creation of a novel category of trading servitudes*

It is clear from the above mentioned discussion of case law that if parties to an agreement desire to create a novel category of real right, their intention should be that the particular condition should be binding on all successors in title who are not parties to the initial contractual agreement.[192] However, compliance with the intention requirement is not sufficient on its own. The subtraction from the *dominium* test should also be met to enable the creation of novel real rights. This test implies that a right may only be registered (and therefore created as a real right in land) if it restricts the right of ownership with regard to the servient tenement.[193]

Case law that is important to determine whether trading rights could amount to a limited real right are: *Ex parte Geldenhuys*, *Lorentz* and *Capex*. The *Ex parte Geldenhuys*[194] case provides authority for the fact that if the particular obligation in question constitutes a burden upon the land, namely a subtraction from the *dominium*, then the corresponding right is real and registrable; and that if the obligation is merely binding on some person in her personal capacity, the corresponding right will constitute a personal right. Thus, the question whether a positive and negative trading right

[188] Chapters 4 and 5 will attempt to provide reasons for the recognition or non-recognition of trading rights in the form of a novel category of servitudes.
[189] MJ de Waal "Identifying real rights in South African law" in S Bartels & M Milo (eds) *Contents of real rights* (2004) 83 97-98.
[190] AJ van der Walt "Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 170 203; MJ de Waal "Identifying real rights in South African law" in S Bartels & M Milo (eds) *Contents of real rights* (2004) 83 97.
[191] *Dyce v Lady Hay* (1852) 1 Macq 305; Voet 8 3 12.
[192] *Nel v Commissioner for Inland Revenue* 1960 (1) SA 227 (A).
[193] AJ van der Walt *The law of servitudes* (2016) 93, 376-380.
[194] 1926 OPD 155.

amounts to a limited real right, depends on determining whether positive and negative trading rights place a burden on the land, or whether they merely place a burden on an individual to render a specific performance. This will be an important consideration in chapters 4 and 5 when these specific trading rights are placed under the spotlight.

The *Lorentz*[195] case added another interesting dimension, namely that the specific condition has to diminish the use of the property in the physical sense.[196] *Capex* confirmed the decision in *Lorentz*, requiring that the condition[197] should diminish the owner's physical use of the land before it could be registered.[198] This requirement may also be helpful to determine whether a trading right is real or not.

In light of the guidelines provided by aforementioned South African courts, it is conceivable that the right to conduct trade on the servient tenement by consent may have the effect of physically diminishing an owner's *dominium*. This is because the servitude burdens the servient tenement and it provides the servitude holder with the rights to use the property and other entitlements that are inherent in ownership. Furthermore, it also prevents the servient tenement owner from exercising her rights to the full capacity. It is also conceivable that a right preventing another from trading on their own property to protect the dominant tenement from commercial competition can constitute a limited real right as such a restriction burdens land and physically diminishes the servient tenement owner's *dominium* with regard to her property.

Conditions such as positive trading rights and negative trading rights are a problematic category of potential servitudal conditions as it may appear at first sight that these conditions may be aimed primarily at benefitting the business interests of the individual owning the benefited property.[199] The difficult question is whether such

---

[195] *Lorentz v Melle and Others* 1978 (3) SA 1044 (T); AJ van der Walt "Personal rights and limited real rights: A historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *Tydskrif vir Heedendaagse Romeins-Hollandse Reg* 170 195-196.

[196] *Lorentz v Melle and Others* 1978 (3) SA 1044 (T) 1052; AJ van der Walt "Personal rights and limited real rights: A historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *Tydskrif vir Heedendaagse Romeins-Hollandse Reg* 170 195-196; MJ de Waal "*Numerus clausus* and the development of new real rights in South African law" (revised version of a paper read at staff seminars at the University of Nijmegen on 21 June 1999 and Maastricht University on 22 June 1999).

[197] *Capex* concerned a condition that restricted the purposes for which land might be used. See *Cape Explosive Works Ltd and Another v Denel (Pty) Ltd and Others* 2001 (3) SA 569 (SCA).

[198] *Cape Explosive Works Ltd and Another v Denel (Pty) Ltd and Others* 2001 (3) SA 569 (SCA) para 15. See also AJ van der Walt *The law of servitudes* (2016) 387.

[199] JA Lovett "Title conditions in restraint of trade" in VV Palmer & EC Reid (eds) *Mixed jurisdictions compared private law in Louisiana and Scotland Edinburgh Studies in Law Volume 6* (2006) 30 31.

forms of agreements can 'run with the land' and therefore be enforced against successors in title of the original parties.[200] Van der Merwe states that the particular condition must be property-like by being connected to the land in some way.[201] The question pertaining to positive and negative trading rights is whether the nature of these rights are property-like in that it is connected to the land. This question could only be answered upon the analysis of compliance with the requirements for the establishment of a praedial or personal servitude, which are discussed separately in Chapter 3. In other words, once all avenues pertaining to the creation of a limited real right has been explored, it will be known whether trading rights have the effect of subtracting from the *dominium*. If these questions are answered in the affirmative, then a powerful and novel category of property interest has emerged in South African law.

## 2 5 Conclusion

The aim of this chapter was to determine whether South African law provides the parameters for the recognition of trading rights as a novel category of servitudes, firstly within the ambit of the *numerus clausus* principle, and secondly, within the context of the subtraction from the *dominium* test as it has been developed by courts in South Africa to distinguish between real and personal rights.

Firstly, it has been shown that the *numerus clausus* will not provide a barrier for the creation of a novel category of servitudes in the form of trading rights. In terms of the *numerus clausus* principle, when a person needs to create a property right, she must select from the available types of property rights.[202] Traditionally, servitudes are already recognised as limited real rights. Therefore, creating a novel category of servitudes pertaining to trading rights should not be challenging, provided that the

[200] JA Lovett "Title conditions in restraint of trade" in VV Palmer & EC Reid (eds) *Mixed jurisdictions compared private law in Louisiana and Scotland Edinburgh Studies in Law Volume 6* (2006) 30 32.
[201] CG van der Merwe "Things, time, time-sharing and shareblocks" in WA Joubert, JA Faris & LTC Harms (eds) *The law of South Africa* vol 27 2 ed (2014) para 68. See also PJ Badenhorst "Registrability of rights in the deeds registry: The twofold test revisited" (2018) 29 *Stellenbosch Law Review* 220 224.
[202] B Akkermans, V Sagaert & W Swadling "General issues: Setting the scene" in S van Erp & B Akkermans (eds) *Cases, materials and text on property law. Ius commune casebooks for the common law of Europe* (2012) 37 69.

essential criteria of a praedial or personal servitude are found within such a potential novel category of servitude.[203]

Secondly, this chapter explained South Africa's statutory framework, supported by doctrine and the criteria for the development of novel limited real rights. Even though South Africa does not have a *numerus clausus* of real rights, it has strict laws in place to prohibit the proliferation of burdens on land when potential novel categories of real rights are to be created. Section 2 4 2 2 illustrated the problems that the parameters provided by South African case law may create with regard to the creation of a novel category of real rights especially with regard to the application of the subtraction from *dominium* test. Discussions of South African case law pertaining to the creation of novel categories of limited real rights illustrated the inconsistency with regard to the application of the subtraction from *dominium* test. It also explained the possible incorrect results that the application of such a test may yield and the legal uncertainty it may create in South African law. Van der Merwe states that the particular condition must be property-like by being connected to the land in some way.[204] The question pertaining to positive and negative trading rights is whether the nature of these rights are property-like in that it is connected to the land. Therefore, in chapter 4 and 5 the extent to which these rights can be real will be scrutinised within the statutory and doctrinal framework.

If these rights can be considered real, an analysis of compliance with the requirements for the establishment of a praedial or personal servitude is required. It is therefore important to note that the South African statutory and doctrinal frameworks for the creation of a novel category of limited real rights also include the establishment requirements for praedial and personal servitudes, which will be discussed in the following chapter.

It can be concluded at this stage that even though there is no *numerus clausus* of real rights in South African law, it is possible to create novel categories of servitudes. The registration requirement that is applicable to real rights in land as well as other

[203] *Dyce v Lady Hay* (1852) 1 Macq 305; Voet 8 3 12. Chapters 3, 4 and 5 will show that not all trading rights have the potential of being acknowledged as a praedial servitude especially if the *utilitas* requirement is not complied with. The *utilitas* requirement is one of the essential principles that should be complied with to establish a praedial servitude.

[204] The theory provided by Sonnekus to distinguish between real and personal rights also serves as a logical guideline to guide courts when confronted with the question whether a right is real or not.

formalities prescribed by legislation and common law requirements, warrants that it is extremely difficult to fragment the character of landownership by means of creating layers of overlapping limited real rights.[205] The most significant anti-fragmentation strategy relating to servitudes in general is the registration requirement together with the subtraction from the *dominium* test. In addition, the most important anti-fragmentation strategy pertaining to praedial servitudes more specifically is the common law *utilitas* requirement, as will be explained in chapters 3. These existing mechanisms in South Africa will ensure that the recognition of novel trading servitudes will not result in the overburdening of ownership rights in South African law.

[205] AJ van der Walt "*Novel servitudes Liber Amicorum – Essays in honour of JC Sonnekus Sakereg*" 2017 *Tydskrif vir die Suid-Afrikaanse Reg* 408 408-420.

# Chapter 3: Establishment requirements for praedial and personal servitudes

## 3 1 Introduction

It is clear from the previous chapter that trading rights can potentially be acknowledged as real rights, provided that they comply with the general establishment requirements as encapsulated by the statutory framework of the Deeds Registries Act,[1] and the existing subtraction from the *dominium* test developed by courts in South African law to distinguish between real and personal rights. Once a trading right is recognised as a real right in land that burdens the land and therefore the landowner and all her successors in title, the next question is whether this real right creates a servitude and, if so, what type of servitude comes into existence (praedial or personal). This requires careful analysis of the establishment requirements for praedial and personal servitudes with the view to determine whether the trading right can be a novel category of servitude.

In general there are two categories of servitudes, namely praedial and personal servitudes.[2] As alluded to in the previous chapter, two main categories of trading rights (each of which could be either a praedial or a personal servitude) can be distinguished, namely an individual's right to trade on someone else's land and the right to prevent someone from trading on their own land. If a trading right creates a praedial servitude, it has to comply with the requirements for the establishment of praedial servitudes. If a trading right in turn creates a personal servitude, the establishment requirements of a personal servitude must be met. These requirements indicate the essential contents of a servitude as well as what may not be included in the contents of a servitude. The common law validity requirements for servitudes (both praedial and personal) serve as an anti-fragmentation device to prevent a proliferation of unnecessary burdens on land to ensure a healthy free trade market.[3] Therefore, these common law requirements will comprehensively be discussed to determine when and how they might be relevant to the recognition of trading rights as praedial servitudes and/or personal servitudes. For

[1] Section 63(1) of the Deeds Registries Act 47 of 1937.
[2] CG van der Merwe *Sakereg* 2 ed (1989) 459; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* 5 ed (2006) 321.
[3] CG van der Merwe *Sakereg* 2 ed (1989) 468; MJ de Waal "Servitudes" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785 789; JL Neels "Erfdiensbaarhede: Nut vir heersende erf" 1988 *Tydskrif vir die Suid-Afrikaanse Reg* 527.

purposes of trading rights potentially creating praedial servitudes, the most relevant (and perhaps problematic) requirement may be the *utilitas* requirement. In the context of trading rights established as personal servitudes, no impediment exists. This chapter will thus form the platform for the analysis that will occur in chapters 4 and 5, where the specific trading rights (both positive and negative) will be analysed in more detail in order to determine whether the establishment requirement for praedial and personal servitudes are met in each context.

## 3 2 Praedial servitudes

### 3 2 1 Nature of praedial servitudes

In *Lorentz v Melle and Others*,[4] the court specified the general basic principles pertaining to the creation and nature of servitudes in South African law. The court indicated that the first stage is to determine whether a specific condition creates a real right to the extent that it diminishes an owner's *dominium* in a thing.[5] The subsequent stage is to determine whether the right has the nature of a praedial or personal servitude. A servitude has a praedial nature if the particular right is constituted in favour of the owner of the dominant tenement.[6] A praedial servitude can only exist over land and it is not transferable separately from the land to which it attaches.[7] The servitude is inseparably attached to the dominant tenement and it passes with the ownership of the dominant tenement.[8] It is correspondingly inseparably attached to the servient tenement irrespective of who the owner is.[9] A praedial servitude is usually established by agreement in the form of a notarial deed between the owners of the two tenements. This process is followed by registration against the title deed of the servient land even though it can also be registered against the title deed of the dominant tenement.[10] To

[4] *Lorentz v Melle and Others* 1978 (3) SA 1048 (T).
[5] See chapter 2.
[6] *Lorentz v Melle and Others* 1978 (3) SA 1048 (T) 1049.
[7] *Webb v Beaver Investments (Pty) Ltd and Another* 1954 (1) SA 13 (T) 25; *Lorentz v Melle and Others* 1978 (3) SA 1048 (T).
[8] JE Scholtens "The law of property" in HR Hahlo & E Kahn *The union of South Africa: The development of its laws and constitutions* (1960) 571-621 600; *Lorentz v Melle and Others* 1978 (3) SA 1048 (T).
[9] JE Scholtens "The law of property" in HR Hahlo & E Kahn *The union of South Africa: The Development of its laws and constitutions* (1960) 571-621 600; *Lorentz v Melle and Others* 1978 (3) SA 1048 (T).
[10] *Van Vuren and Others v Registrar of Deeds* 1907 TS 289, 295; CG Hall *CG Hall & EA Kellaway Servitudes* 3 ed (1973) 27; *Lorentz v Melle and Others* 1978 (3) SA 1048 (T). It is important to note that registration of a notarial deed does not render the specific right as having a servitudal character. It may

determine whether the particular servitude is praedial, it also has to be in compliance with the common law validity requirements which generally also form part of the statutory and doctrinal framework for the creation of limited real rights. These requirements will be discussed subsequently.

### 3 2 2 Prerequisites for the establishment of praedial servitudes

#### *3 2 2 1 Introduction*

Before discussing the common law validity requirements, it is important to take note that while common law validity requirements exist for the establishment of praedial servitudes, it should still be flexible enough to allow for the creation of new praedial servitudes when the needs of a developing modern society so require.[11] According to Voet, new servitudes may be added to those servitudes which are already identified at the desire of contracting parties, subject to the condition that the nature of praedial or personal servitudes is found within the newly created category of servitudes.[12] This view of Voet serves as authority that no *numerus clausus* of praedial servitudes exists within the Roman-Dutch law.[13] An assertion of this definite nature is not found in any of the Roman texts and there is little doubt that this statement is also accurate pertaining to classical and post-classical Roman law.[14] The mere fact that standard examples of praedial servitudes were included in the *praetor*'s edict does not imply that other new examples could not be created.[15] However, the only proviso is that basic

happen that personal rights are accidentally registered. The mere fact that personal rights are registered does not convert them into real rights.

[11] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 14-15; MJ de Waal "Servitudes" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785 789.

[12] Voet 8 3 12: Full citation J Voet 1647-1713 *Commentarius ad Pandectas* translated by Gane P *Commentary on the Pandect* (1955-1958); MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 14; MJ de Waal "Servitudes" in R Feenstra, R Zimmerman (eds) *Das römisch-holländische recht: Fortschritte des Zivilrechts im 17 Und 18 Jahrundert* (1992) 567 573.

[13] MJ de Waal "Servitudes" in R Feenstra, R Zimmerman (eds) *Das römisch-holländische recht: Fortschritte des Zivilrechts im 17 Und 18 Jahrundert* (1992) 567 573.

[14] R Elvers *Die römische servitutenlehre* (1856) 134; JAC Thomas *Textbook of Roman law* (1976) 197. See MJ de Waal "Servitudes" in R Feenstra, R Zimmerman (eds) *Das römisch-holländische recht: Fortschritte des Zivilrechts im 17 Und 18 Jahrundert* (1992) 567 573.

[15] F Schulz *Classical Roman law* (1951) 383; MJ de Waal "Servitudes" in R Feenstra, R Zimmerman (eds) *Das römisch-holländische recht: Fortschritte des Zivilrechts im 17 Und 18 Jahrundert* (1992) 567 573.

requirements had to be complied with before a praedial servitude could be added to the list of already existing categories of servitudes.[16]

It was only the pandectists who intentionally tried to identify a list of formal requirements for the establishment of a praedial servitude and to present them in a more organised structure.[17] De Waal asserts that it is impossible to find legal scholars that formulated the validity requirements for the establishment of a praedial servitude in a similar manner, as no unanimity exists among these scholars.[18] Even in South African law, no unanimity exists regarding the formal establishment requirements for a praedial servitude.[19] Generally speaking, the requirements for the establishment of

[16] MJ de Waal "Servitudes" in R Feenstra, R Zimmerman (eds) *Das römisch-holländische recht: Fortschritte des Zivilrechts im 17 Und 18 Jahrundert* (1992) 567 573.

[17] JW Hedemann *Sachenrecht des Bürgerlichen Gesetzbuches* 3 ed (1960) 247. See MJ de Waal "Servitudes" in R Feenstra, R Zimmerman (eds) *Das römisch-holländische recht: Fortschritte des Zivilrechts im 17 Und 18 Jahrundert* (1992) 567 574.

[18] H Dernburg *Pandekten* vol I (1892) 571; Dernburg mentions only three requirements, namely *utilitas*, *vicinitas* and *perpetua causa*. The passivity requirement is dealt with independently as a characteristic of a servitude and not as an establishment requirement. See MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 23 -24. L Arndts & R Von Arnesberg *Lehrbuch der pandekten* (1886) 341 added three additional requirements to the requirements already mentioned by Dernburg, namely the connection between the servient and dominant tenement, the fact that a servitude should be exercised *civiliter modo* and the fact that a servitude is indivisible. Arndts categorises these requirements under the heading of general principles and not as establishment requirements. Seuffert's formulation in JA Seuffert *Praktisches Pandektenrecht* vol I 4 ed (1860) 206 is in compliance with the formulation provided by Arndts. Where he differs from Arndts is that he replaces the *perpetua causa* principle with the requirement that the owner of the servient tenement may not restrict the servitude holder from exercising her right. B Windscheid *Lehrbuch des Pandektenrechts* (1900) 944; Furthermore it is only Windscheid who explicitly mentions the requirement that there should be two different parcels of land belonging to different owners. Modern Romanists' discussion of the establishment requirements for a praedial servitude differs from the Pandectists discussions. The *servitus in faciendo consistere nequit* is mentioned explicitly as a requirement by the modern Romanists. See B Biondi *Istituzioni di diritto romano* (1956) 286, P Jörs & W Kunkel (ed) *Römisches Privatrecht (Auf Grund des Werkes von Paul Jörs* (1949) 144, M Kaser *Das römische Privatrecht* vol 1 2 ed (1971) 443, F Schulz *Classical Roman law* (1951) 393, S Sutro *Leerboek der Instituten* (1878) 349, J Ter Heide *Kort begrip van Romeins recht* (1967) 69. Compare the aforementioned Roman scholar's discussions with R Elvers *Die römische servitutenlehre* (1856) 138 and E Rabel *Grundzüge des römischen privatrechts* 2 ed (1955) 81 as these two scholars do not discuss it as part of the requirements for the establishment of praedial servitudes.

[19] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 24. See CG van der Merwe *Sakereg* 2 ed (1989) 467 mentions the following validity requirements under the heading of nature and characteristics of a praedial servitude: the existence of two parcels of land, *utilitas* (from which the requirements of *vicinitas* and *perpetua causa* flows) and the passivity requirement (*servitus in faciendo consistere nequit*). In addition, Van der Merwe also discusses the indivisibility of praedial servitudes. The latter is regarded as a characteristic of a praedial servitude. HJ Erasmus, CG van der Merwe & AH Van Wyk *RW Lee & AM Honoré Family, things and succession* 2 ed (1983) para 373 and HJ Delport & NJJ Olivier *Sakereg vonnisbundel* 2 ed (1985) 546 discusses indivisibility as a establishment requirement for the existence of a praedial servitude. HJ Delport & NJJ Olivier *Sakereg vonnisbundel* 2 ed (1985) 546 also regards *utilitas* and *vicinitas* as connected and not independent. However, they regard *pepetua causa* as an independent requirement. JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 340 chooses the heading "General characteristics of a servitude". Under this heading they mention the following: *civiliter modo*, *servitus in faciendo consistere nequit*, *servitus servitutis esse non potest*, *nulli res sua servit*, the *vicinita*s requirement and that a servitude is not established for mere pleasure. According to De Waal

praedial servitudes are the existence of two parcels of land; *nulli res sua servit* (one cannot hold a servitude over your own property); *vicinitas* (the dominant and servient tenement should be in close proximity to each other); *perpetua causa* (the benefit provided by the servient tenement should be reasonably durable); *utilitas* (the servient tenement should provide a benefit for the dominant tenement); *servitus in faciendo consistere nequit* (servitudes do not impose positive obligations); indivisibility; *civiliter modo* (reasonable exercise of the servitude with due regard to the other party) and *servitus servitutis esse non potest* (there can be no servitude over another existing servitude).[20] However, De Waal immediately refines the aforementioned cluttered list containing the generally proposed establishment requirements for praedial servitudes.[21] He eliminates the following principles: *nulli res sua servit*, *civiliter modo* and *servitus servitutis esse non potest*.[22] In this regard, De Waal argues that the principle *nulli res sua servit* is generally applicable in property law and not only with regard to the law of servitudes. In the context of the law of servitudes it merely means that the owner of a parcel of land may not establish a servitude over her own parcel of land for her own benefit as one cannot hold a servitude over your own property.[23] It is pointless for this principle to be regarded as an establishment requirement as it already fits into the establishment requirement for praedial servitudes that two parcels of land, belonging to different owners should exist.[24] In addition, the principle of *civiliter modo* cannot be regarded as an establishment requirement for a praedial servitude as this characteristic of a servitude only becomes relevant once the praedial servitude has already been established and when the exercise of a servitudal right comes into play.[25] Furthermore, the principle of *servitus servitutis esse non potest* can also immediately be excluded as this cannot be regarded as an establishment requirement. This

---

this merely looks like a combination of characteristics and 'requirements' for the establishment of servitudes. He also mentions that the discussion of requirements and characteristics by H Silberberg & J Schoeman (ed) *The law of property* 2 ed (1983) 390, CG Hall *CG Hall & EA Kellaway Servitudes* 3 ed (1973) 1 and AFS Maasdorp revised CG Hall (ed) *Maasdorp's Institutes of South African Law: vol II The law of property* 9 ed (1971) 127 is confusing.

[20] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 25. See footnote 19 above.

[21] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 25-27.

[22] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 25-27.

[23] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 25. AFS Maasdorp *Maasdorp's Institutes of South African law vol 2: The law of things* 6 ed (1938) 177.

[24] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 25.

[25] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 26.

principle is merely a convenient means to express the view that a servitude holder may not create a servitude over another existing servitude.[26] De Waal maintains that this is a general principle of the law of servitudes that clarifies the limits of the servitude holder's entitlements.[27] The principle of *servitus servitutis esse non potest*, as a general principle of the law of servitudes, describes the characteristic and nature of all servitudes, including personal servitudes and therefore it cannot be regarded as a specific establishment requirement for a praedial servitude.[28]

Therefore, arguably the narrowed-down requirements for the establishment of a praedial servitude are: two tenements should exist as this is an essential characteristic that distinguishes a praedial servitude from a personal servitude, the passivity requirement should be complied with, which entails what may not be included in the contents of a praedial servitude and the *utilitas* principle should be complied with as it indicates the required contents of a praedial servitude.[29] The elements of *vicinitas* and *perpetua causa* are in essence covered by the *utilitas* requirement and should therefore not be treated as separate or independent requirements.[30] The establishment requirements will accordingly be considered.

### *3 2 2 2 Two tenements*

A dominant tenement and servient tenement belonging to different owners is a requirement for the existence of a praedial servitude.[31] Praedial servitudes can only

[26] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch (University 1989) 25. Authority confirming that there can be no servitude over an existing servitude: Voet 8 4 7; *Engelbrecht v Brits* 1906 TS 274 289; *Dreyer v Letterstedt's Executors* (1865) 5 Searle 88 99; CG Hall *CG Hall & EA Kellaway Servitudes* 3 ed (1973) 2; CG van der Merwe *Sakereg* 2 ed (1989) 463; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 548-549; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 323-324; AJ van der Walt *The law of servitudes* (2016) 110-114.

[27] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 25; AJ van der Walt *The law of servitudes* (2016) 111.

[28] AJ van der Walt *The law of servitudes* (2016) 111.

[29] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 23–29.

[30] See summary and full dissertation of MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989); JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 584.

[31] Voet 8 1 2; Van Leeuwen *Censura forensis* 1 2 14 11: Full citation S van Leeuwen *Censura forensis theoretico practica* (1662) 1 2 14 11; *Dreyer v Ireland* (1874) 4 Buch 193 199-200; *In re Bennett and Green and the Bank of Africa Ltd* 1901 22 NLR 404 407; *City Deep v McCalgan* 1924 WLD 276 279; *Van der Vlugt v Salvation Army Property Co* 1932 CPD 56 59; CG Hall *CG Hall & EA Kellaway Servitudes* 3 ed (1973) 3-4; CG van der Merwe *Sakereg* 2 ed (1989) 468; MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University

exist when one property serves another property.[32] Furthermore, the requirement entails that the rights of the servient tenement owner are decreased and the rights of the dominant tenement owner are enhanced. Moreover, a praedial servitude can be enjoyed by every successive owner of the dominant tenement and every successive owner of the servient tenement will be burdened by it. For this to occur, a praedial servitude cannot exist without two tenements. In *Van der Vlugt v Salvation Army Property Co*[33] the court held that a right of a municipality to install sewage pipes on the land belonging to the owners thereof did not constitute a praedial servitude because no dominant tenement could be identified. Thus, if a dominant tenement does not exist, only a personal servitude can be established and not a praedial one.[34]

### *3 2 2 3 Vicinitas*

As discussed above, a praedial servitude cannot be established without the existence of a dominant and servient tenement.[35] These two tenements must presumably be in close proximity to each other. However, *vicinitas* is a pliable concept with many possible interpretations.[36] On the one hand, it can mean that the dominant and servient tenement must have a common border. On the other hand, it can imply that the two

(1989) 27-29; MJ de Waal "Servitudes" in R Feenstra, R Zimmerman (eds) *Das römisch-holländische recht: Fortschritte des Zivilrechts im 17 Und 18 Jahrundert* (1992) 567 574; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 323; AJ van der Walt *The law of servitudes* (2016) 124-127, see page 126. French law (article 637 of the Code Civil), Belgian law (article 637 of the Burgerlijk Wetboek) and Dutch law (article 5:70(1) of the Burgerlijk Wetboek) require two properties owned by different persons. In German law the owner of the dominant and servient tenement can be the same person. AJ van der Walt *The law of servitudes* (2016) 126 footnote 243: Van der Walt relies on numerous German sources to substantiate the statement regarding German law, B Akkermans & W Swadling "Types of property rights – immovable and movables (goods)" in S van Erp & B Akkermans (eds) *Cases, materials and text on property law* (2012) 211 245.

[32] Voet 8 1 2.

[33] 1932 CPD 56. See also *Baehnisch v Estate Odendaal* 26 (1909) SC 152 153; *Fison Albatros Fertilizers Ltd v Salisbury Municipality* 1931 SR.

[34] CG Hall *CG Hall & EA Kellaway Servitudes* 3 ed (1973) 3-4; CG van der Merwe *Sakereg* 2 ed (1989) 468; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 323; MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 28; AJ van der Walt *The law of servitudes* (2016) 124-127.

[35] *D* 8 4 11: Full citation T Mommsen & P Krüger *Digesta Iustiniani in Corpus iuris civilis* (1920) 8 4 11; JL Neels "Naburigheid as vereiste vir erfdiensbaarhede" 1990 *Tydskrif vir die Suid-Afrikaanse Reg* 254.

[36] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 30; JL Neels *Onderskeidende kenmerke by erfdiensbaarhede* (1989) 113; MJ de Waal "Servitudes" in R Feenstra, R Zimmerman (eds) *Das römisch-holländische recht: Fortschritte des Zivilrechts im 17 Und 18 Jahrundert* (1992) 567 574-577; MJ de Waal "Servitudes" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785 790.

tenements must be situated in the same neighbourhood or within a reasonable distance from each other. According to Delport and Olivier[37] whether the two parcels of land should have a common border or a reasonable distance between them, will depend on whether the praedial servitude is rural or urban in nature.[38] These scholars assert that in the case of rural servitudes, the requirement is that the two parcels of land should share a common border except in the case where an intervening parcel of land is also burdened with a servitude or where a public servitude of right of way is located between the two tenements, in which case it will not be necessary for the two tenements to share a common border.[39] Furthermore, they aver that in the case of urban praedial servitudes, the *vicinitas* requirement should be applied in a less strict manner and that a praedial servitude can be established if there is no common border.[40] Hall and Kellaway,[41] on the other hand, fail to provide an explanation with regard to when a common border should be a prerequisite and when a reasonable distance between the two tenements would suffice for the establishment of a praedial servitude.[42] Sonnekus and Neels in turn assert that the existence of a common border between two parcels of land is not a prerequisite for the establishment of a praedial servitude.[43] He states that if the tenements are located reasonably close to one another

[37] HJ Delport & NJJ Olivier *Sakereg vonnisbundel* 2 ed (1985) 548; CG van der Merwe *Sakereg* 2 ed (1989) 470.

[38] Praedial servitudes are always classified according to two sets of categorical distinctions, namely between positive and negative servitudes; and between rural and urban servitudes. See AJ van der Walt *The law of servitudes* (2016) 406. Van der Merwe and De Waal indicate that the aforementioned two sets of categories overlap in light of the fact that rural servitudes are mostly positive and urban servitudes are mostly negative in character. See CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2 ed (2010) para 554. The distinction between urban and rural servitudes depends on the usage of the dominant tenement and not the location thereof. Urban land used for agriculture can benefit from a rural servitude such as a servitude of aqueduct. Rural land that is used for residential purposes in turn can benefit from an urban servitude such as prospect or view. See CG van der Merwe *Sakereg* 2 ed (1989) 479; MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 52; CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2 ed (2010) para 554; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 326; AJ van der Walt *The law of servitudes* (2016) 407.

[39] Delport and Olivier in HJ Delport & NJJ Olivier *Sakereg vonnisbundel* 2 ed (1985) 548 relies on *Briers v Wilson and Others* 1952 (3) SA 423 (C) and *Bisschop v Stafford* 1974 (3) SA 1 (A) as authority. See also MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 52.

[40] HJ Delport & NJJ Olivier *Sakereg vonnisbundel* 2 ed (1985) 548. See also MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 52. See footnote 39 above.

[41] CG Hall *CG Hall & EA Kellaway Servitudes* 3 ed (1973) 3.

[42] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 52-53.

[43] JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 604-605.

it will be regarded as sufficient for the establishment of a praedial servitude. Lee and Honoré's[44] view in this regard accords with Sonnekus's explanation.[45]

Traces of the narrow and liberal interpretation of the *vicinitas*-requirement for praedial servitudes can also be found amongst Roman-Dutch law authors.[46] Authors in favour of the liberal interpretation did not regard the principle of *vicinitas* as an independent requirement.[47] They regarded it as a factor that had to be taken into consideration when the fundamental issue of utility was examined.[48] This means that

[44] HJ Erasmus & CG van der Merwe & AH van Wyk *RW Lee & AM Honoré Family, things and succession* 2 ed (1983) para 372.

[45] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 53.

[46] A narrow interpretation of the *vicinitas* requirement can be found in Van der Linden *Koopmans Handboek* 1 11 1: Full citation J van der Linden *Regtsgeleerd, practical en koopmans handboek, ten dienste van regters, practizijns, kooplieden, en allen die een algemeen overzicht van regtskennis verlangen* (1806) 1 11 1 and in Van der AA *Hedendaagsche Hollandsche regtsgeleerdheid* 1 2 16 1: Full citation PJBC van der AA *Inleiding tot de hedendaagsche Hollandsche regtsgeleerdheid en praktijk* vol 2 (1810) 1 2 16 1; JH Beekhuis *C Asser Handleiding tot de beoefening van het Nederlandsch Burgerlijk Recht: Zakenrecht* Deel II: artikels 625-876: Eigendom en Beperkte Zakelijke Genotsrechten 11 ed (1983) 194-195; J Köhler "Beitrage zum Servitutenrecht" (1897) 87 *Archiv für die civilistische Praxis* 157 183-187. See JL Neels *Onderskeidende kenmerke by erfdiensbaarhede* (1989) 113. A liberal interpretation of the *vicinitas* requirement can be found in Voet 8 4 19, RW Lee *An introduction to Roman-Dutch law* (1968) 175-176 and A Vinnius *Institutionum* 2 3: Full citation A Vinnius *Imperialum Commentarius* (1726) 2 3. For a detailed discussion of the historical authorities, see MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 43-45; MJ de Waal "Servitudes" in R Feenstra, R Zimmerman (eds) *Das römisch-holländische recht: Fortschritte des Zivilrechts im 17 Und 18 Jahrundert* (1992) 567 574-577; MJ de Waal "Servitudes" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785 790. Important jurists such as Grotius, Van der Keessel and Groenewegen did not provide any information regarding the possible interpretation of the *vicinitas* requirement. See MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 45.

[47] JL Neels "Naburigheid as vereiste vir erdiensbaarhede" 1990 *Tydskrif vir die Suid-Afrikaanse Reg* 254 256; MJ de Waal "Servitudes" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785 790.

[48] JL Neels "Naburigheid as vereiste vir erdiensbaarhede" 1990 *Tydskrif vir die Suid-Afrikaanse Reg* 254 256; MJ de Waal "Servitudes" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785 790. AJ van der Walt *The law of servitudes* (2016) 157 footnote 327; B Akkermans & W Swadling "Types of property rights-immovables and movables (goods)" in S van Erp & B Akkermans (eds) *Cases, materials and text on property law* (2012) 211 245: Civil law jurisdictions interpret the *utilitas* requirement to imply that the two tenements ought to be reasonably close to each other and that it is not necessary that it should be contiguous. In the 1992 version of the Dutch Burgerlijk Wetboek, the vicinity requirement of the 1838 text was omitted. Utility in Dutch law is understood very widely. §1019 of the *Burgerlike Gezetschbuch* requires utility, however this does not mean that the two tenements ought to be contiguous or close together. The required proximity between the two tenements will be determined by the content of the servitude. In this regard see AHT Heisterkamp "Beperkte regten op goederen" in WHM Reehuis & AHT Heisterkamp with GE van Maanen & GT de Jong (eds) *Pitlo Het Nederlands burgerlijk recht* part 3 *Goederenrecht* 13 ed (2012) 437-514 453; EB Rank-Berenschot "Beperkte genotsrechten" in HJ Snijders & EB Rank-Berenschot (eds) *Goederenrecht* 5 ed (2010) 509-572 531 (para 637). See also MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 47-48 and DU Otto "Dienstbarkeiten" in H Grziwotz, A Keukenschrijver & G Ring (eds) *NomosKommentar BGB Sachenrecht* vol 3 § 854-1296 3 ed (2013) 955-1181 991 (para 5). See further AJ van der Walt *The law of servitudes* (2016) 157.

the distance between the dominant and servient tenements was one of the factors that had to be examined in relation to the question whether a specific servitude could be of benefit to the dominant tenement in the particular circumstances. The question that emerges is whether this liberal approach to the requirement of *vicinitas* has been received into South African law.[49]

De Waal states that an analysis of South African court decisions shows that the *vicinitas* requirement was never given top priority in the establishment and exercise of praedial servitudes.[50] This can be due to the fact that the circumstances of the case law analysed were of such a nature that the requirement of *vicinitas* was not an issue.[51] In these judgments the dominant and servient tenements were in any event adjoining.[52] Nonetheless, there are also judgments where the *vicinitas* requirement was not explicitly considered despite the fact that the tenements did not have a common border.[53]

Therefore, the pragmatic approach of some of the Roman-Dutch law authors,[54] in terms of which the *vicinitas* requirement should be assessed within the wider setting of the *utilitas* requirement, so that the *vicinitas* requirement was informed by the *utilitas* requirement, did in actual fact acquire a foothold in South African law.[55] *Hawkins v Munnik*[56] illustrates that even though two tenements were not directly adjoining, it did

[49] MJ de Waal "Servitudes" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785 790.
[50] MJ de Waal "Servitudes" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785 790.
[51] *D* 8 3 7 1, 8 2 1; Voet 8 4 19; Huber *Hedendaegse rechts-geleertheyt* 2 43 17: Full citation U Huber *Hedendaegse rechts-geleertheyt, soo elders, als in Frieslandt gebruikelyk* (1768) 2 43 17; *Briers v Wilson and Others* 1952 (3) SA 423 (C) 433, 439; *Bisschop v Stafford* 1974 (3) SA 1 (A); CG van der Merwe *Sakereg* 2 ed (1989) 470; MJ de Waal "Servitudes" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785 790.
[52] *Laubscher v Reve* (1866) 1 Roscoe 408; *Wolvaardt v Pienaar* (1884) 1 SAR 162; *De Klerk v Niehaus* (1897) 14 SC 302; *City Deep v McCalgan* 1924 WLD 276; *Mocke v Beaufort West Municipality* 1939 CPD 135; *Penny v Brentwood Gardens Body Corporate* 1983 (1) SA 487 (C); *Brink v Van Niekerk* 1986 (3) SA 428 (T).
[53] See for example *Heidelberg Municipality v Uys* (1898) 15 SC 156; *Kempenaars v Jonker, Van der Berg and Havenga* (1898) 5 OR 223; *Aberdeen Municipality v Aberdeen Dutch Reformed Church* (1905) 22 SC 474; *Volschenk v Van den Berg* 1917 TPD 321; *Badenhorst v Joubert and Others* 1920 TPD 100.
[54] Voet 8 4 19; Vinnius *Institutionum* 2 3.
[55] MJ de Waal "Servitudes" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785 791.
[56] (1830) 1 Menz 465. This judgment is a modern example of a situation that is discussed in the Digest and that has been solved in the same pragmatic manner - see *D* 8 3 38. A discussion of this case can be found in MJ de Waal "Servitudes" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785 791.

not prevent the establishment and exercise of a praedial servitude.[57] This case illustrates that the establishment of a praedial servitude is not prohibited if the dominant and servient tenement do not share a common border. The line of reasoning in the *Hawkins* case was also followed in *Briers v Wilson and Others*.[58] The dominant tenement was cut off from the servient tenement by a road that was located on intervening properties, separating the dominant and servient tenements from each other.[59] The court considered the flexible approach of Voet[60] in which it is specified that in the case of a rural servitude where the servient tenement does not border the dominant tenement, the rural servitude can only be subject to a servitude if another servitude can be established over the portion of land situated between the dominant and servient tenements (in favour of the dominant tenement owner).[61]

In this case, the dominant tenement owner did not establish a prescriptive right of way to go over the intervening land, therefore the court held that no servitude had been acquired. The importance of *Briers v Wilson and Others*[62] is that the court reached its conclusion based on the *utilitas* requirement instead of relying specifically on the *vicinitas* requirement.[63] In the *Briers* case, the intervening parcel of land

[57] In *Hawkins v Munnik* (1830) 1 Menz 465 the plaintiff and defendant's parcels of land were separated by a river. The plaintiff sought an order authorising him to build a footbridge over the river to enable him to exercise his servitudal right to draw water from the servient tenement. The defendant admitted that the plaintiff had a right to take drinkwater but he maintained that the plaintiff had no right of way over the river to the servient tenement to collect the water. The defendant argued that he had a personal agreement with the executors of the estate of his predecessor that when he purchased the servient tenement that there was to be no servitude of a bridge and therefore he removed the bridge. The court held that the deed of transfer by the executors constituted an unlimited right of servitude to take drinkwater and that this servitude implied a right of way in favour of the owner of the dominant tenement to the fountain. Therefore, when a dominant and servient tenement are located on the different side of a river, the relevant servitude implies a right to a footbridge over the river. The construction of a footbridge made the exercise of the servitudal right possible. It is important to note that when a river, located between two parcels of land, is extremely wide to the extent that no footbridge could be built, a praedial servitude will not be established due to the particular circumstances. See MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 55.

[58] 1952 (3) SA 423 (C).

[59] 1952 (3) SA 423 (C) 426, 439, 441: The largest part of the road was located on the portions of the defendants' land that was leased by the plaintiff. The court held that the existence of the lease agreement curtailed the continuity of the prescription period and that the plaintiff has not acquired any servitudal rights by means of prescription over the defendants' intervening property.

[60] Voet 8 4 19.

[61] The court also referred to a number of passages in the Digest that endorses Voet's view, namely *D* 8 3 7 (1), 39 3 17; 2, 3 and 4; 8 3 5 (1). Watermeyer J pointed out that all these passages appear to envisage the situation where there is a separate and distinct tract of land situated between the dominant and servient tenement. See *Briers v Wilson and Others* 1952 (3) SA 423 (C) 433.

[62] 1952 (3) SA 423 (C).

[63] AFS Maasdorp *Maasdorp's Institutes of South African law vol 2: The law of things* 6 ed (1938) 201-202; *Briers v Wilson and Others* 1952 (3) SA 423 (C) 433: A praedial servitude should offer some advantage to the dominant tenement to the degree that the value or the enjoyment derived from the servitude is increased. Consequently, once the utility of a servitude has come to an end, the servitude

prohibited the establishment of a praedial servitude of right of way because it hindered the owner of the dominant tenement from exercising his servitudal right for the benefit of the dominant tenement.[64] The approach followed by the court indicates the essential link between the *vicinitas* and *utilitas* requirements that was already apparent in Roman-Dutch law.[65] Many of the South African academic authors' point of view is reconcilable with the interpretation that vicinity as a validity requirement for the establishment of a praedial servitude cannot be treated as an independent requirement, but that it should be treated as an element of utility.[66] This view is widely accepted as the correct approach to this requirement.[67]

### *3 2 2 4 Perpetua causa*

The requirement of *perpetua causa* originates from the Digest.[68] This principle entails that the servient tenement must be capable of constantly fulfilling the needs of the

automatically becomes extinguished. As an extension of the *utilitas* requirement, it follows that the dominant and servient tenement ought to be neighbouring. This does not imply that the two tenements ought to be contiguous or adjoining. However, they should be located in such a manner that it is possible for the servitude to afford some benefit to the dominant tenement. Rural servitudes require that the intervening properties should be subject to a servitude (even though the servitude on the intervening properties do not have to be the same as the servitude registered against the servient tenement). The reason for this is that the servient tenement should be connected with the dominant tenement. An urban servitude may subsist where the two tenements are separated by intervening properties that are not burdened with a servitude. See also MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 57.

[64] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 57.

[65] MJ de Waal "Servitudes" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785 791.

[66] AFS Maasdorp *Maasdorp's Institutes of South African law vol 2: The law of things* 6 ed (1938) 202 as quoted in *Briers v Wilson & Others* 1952 (3) SA 423 (C) 433-434; HJ Erasmus, CG van der Merwe & AH van Wyk *RW Lee & AM Honoré Family, things and succession* 2 ed (1983) 303; CG van der Merwe *Sakereg* 2 ed (1989) 470; MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 298 footnote 30; MJ de Waal "*Vicinitas* of nabuurskap as vestigingsvereiste vir grondserwitute" 1990 *Tydskrif vir die Suid-Afrikaanse Reg* 186-206; JL Neels *Onderskeidende kenmerke by diensbaarhede* (1989) 162 footnote 113; JL Neels "Naburigheid as vereiste vir erdiensbaarhede" 1990 *Tydskrif vir die Suid-Afrikaanse Reg* 254 257-260; CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2 ed (2010) para 554; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 323; AJ van der Walt *The law of servitudes* (2016) 151.

[67] AFS Maasdorp *Maasdorp's Institutes of South African law vol 2: The law of things* 6 ed (1938) 202 as quoted in *Briers v Wilson & Others* 1952 (3) SA 423 (C) 433-434; CG van der Merwe & AH Van Wyk *RW Lee & AM Honoré Family, things and succession* 2 ed (1983) 303; JL Neels "Naburigheid as vereiste vir erdiensbaarhede" 1990 *Tydskrif vir die Suid-Afrikaanse Reg* 254 257-260; MJ de Waal "Servitudes" in R Feenstra, R Zimmerman (eds) *Das römisch-holländische recht: Fortschritte des Zivilrechts im 17 Und 18 Jahrundert* (1992) 567 577 footnote 64 indicates German authors who are accepting of this view.

[68] *D* 8 2 28; MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 67-70; MJ de Waal '*Perpetua causa* (permanente

dominant tenement.[69] In this regard, the true meaning of the text in the Digest is questionable.[70] The practice, which the text refers to, was most probably restricted in Roman law to certain water servitudes because the durability of the water source was regarded as an important determinant for the existence of the servitude.[71] Roman law examples of a servient tenement constantly fulfilling the needs of the dominant tenement are a right of sailing established in respect of a permanent lake and a servitude of leading water over another individual's land established in respect of 'living' water from fountains or springs and not in respect of a lake or a pond.[72] A praedial servitude could only be established if the servient tenement provided a benefit to the dominant tenement on a perpetual basis.[73] If the principle of *perpetua causa* is strictly applied, the effect of this requirement would restrict the establishment of praedial servitudes.[74]

---

grondslag) as vestigingsvereiste vir grondserwitute' (1991) 54 *Tydskrif vir Heedendaagse Romeins-Hollandse Reg* 717 719-720; MJ de Waal "Servitudes" in R Feenstra, R Zimmerman (eds) *Das römisch-holländische recht: Fortschritte des Zivilrechts im 17 Und 18 Jahrundert* (1992) 567 577; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 610-613; AJ van der Walt *The law of servitudes* (2016) 159.

[69] *D* 8 2 28; Voet 8 4 17; Huber *Heedendaegse Rechtsgeleertheyt* 2 43 7; Voet 8 4 17; B Windscheid *Lehrbuch des Pandektenrechts* (1900) 209 footnote 7; *Venter v Minister of Railways* 1949 (2) SA 178 (EC) 185; AFS Maasdorp *Maasdorp's Institutes of South African law vol 2: The law of things* 6 ed (1938) 201-202; MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 67-70; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 610; CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) The *law of South Africa* vol 24 2 ed (2010) para 548; AJ van der Walt *The law of servitudes* (2016) 158.

[70] S Perozzi "*Perpetua causa* nelle servit – Prediali Romane" 14 (1893) *Rivisita italiana per la scienze giurdiche (Milán)* 175 asserts that the Roman jurists required *perpetua causa* for the establishment of praedial servitudes which related to water only; IH Hijmans *Romeinsch Zakenrecht* (1926) 224 states that the argument that *D* 8 2 28 should be interpreted as *perpetua causa* being a general requirement for the establishment of a praedial servitude is a far-fetched overgeneralisation; P Bonfante & J Hamburger *Grondbeginselen van het Romeinsche Recht* (1919) 347; MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 68-70; MJ de Waal "*Perpetua causa* (permanente grondslag) as vestigingsvereiste vir grondserwitute" (1991) 54 *Tydskrif vir Heedendaagse Romeins-Hollandse Reg* 717 720; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 611; JL Neels "Naburigheid as vereiste vir erfdiensbaarhede" 1990 *Tydskrif vir die Suid-Afrikaanse Reg* 447 456; JL Neels "Ewigdurende oorsaak. Die *perpetua causa*-vereiste by erfdiensbaarhede: Behoefte van die heersende erf en geskiktheid van die dienende erf (deel 1)" 2010 *Tydskrif vir die Suid-Afrikaanse Reg* 73 77-78; AJ van der Walt *The law of servitudes* (2016) 159.

[71] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 72-75; MJ de Waal "*Perpetua causa* (permanente grondslag) as vestigingsvereiste vir grondserwitute" (1991) 54 *Tydskrif vir Heedendaagse Romeins-Hollandse Reg* 717 720; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 610-613; AJ van der Walt *The law of servitudes* (2016) 159; AJ van der Walt *The law of servitudes* (2016) 159.

[72] *D* 8 2 28; CG van der Merwe *Sakereg* 2 ed (1989) 471; CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2 ed (2010) para 548.

[73] *D* 8 2 28.

[74] MJ de Waal "Servitudes" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785 793.

De Waal is of the opinion that the classic legal Roman jurists never intended for the *perpetua causa* requirement to be interpreted in such a strict manner.[75] This may explain why the German pandectists never adhered to this strict interpretation of the *perpetua causa* requirement.[76] The German pandectists formally described perpetuity as an outcome or a feature of the *utilitas* requirement. Perpetuity necessitates that the characteristic or feature of the servient tenement serving the utility of the dominant land must be of an enduring nature and not short-lived.[77] The principle of *utilitas* suggests that when a praedial servitude is established, it must serve the needs of the dominant tenement and all the successive owners of the dominant land.[78] Therefore, it must not be aimed at accommodating the casual or temporary needs of a specific dominant tenement owner.[79] According to the pandectists, this implies that the nature and qualities of the servient tenement from which the benefit is derived, cannot be merely transient and incidental.[80]

The improved approach pertaining to the *perpetua causa* requirement as adopted by the pandectists is not found amongst the Roman-Dutch authors who deal with the issue in detail.[81] The Roman-Dutch authors never fully articulated the important connection between the requirements of *perpetua causa* and *utilitas*.[82] The approach

[75] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 68-72.
[76] MJ de Waal "Servitudes" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785 793.
[77] A Brinz *Lehrbuch der Pandekten* (1884) 764-765; H Dernburg *Pandekten* vol I (1892) 574; KA von Vangerow *Lehrbuch der Pandekten* vol I 7 ed (1865) 710; B Windscheid *Lehrbuch des Pandektenrechts* (1900) 945-946 footnote 8. See MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 79-80; MJ de Waal "*Perpetua causa* (permanente grondslag) as vestigingsvereiste vir grondserwitute" (1991) 54 *Tydskrif vir Heedendaagse Romeins-Hollandse Reg* 717 720; AJ van der Walt *The law of servitudes* (2016) 159-160.
[78] CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2ed (2010) para 548. For a discussion of the utility requirement, see part 3 2 2 5 below.
[79] CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2 ed (2010) para 548.
[80] L Arndts & R Von Arnesberg *Lehrbuch der pandekten* (1886) 343; H Dernburg *Pandekten* vol I (1892) 574; CF Glück *Pandecten* vol x (1808) 37; KA Von Vangerow *Lehrbuch der Pandekten* vol I 7 ed (1865) 710; O Wendt *Lehrbuch der Pandekten* (1888) 381; B Windscheid *Lehrbuch des Pandektenrechts* (1900) 945. See MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 79-80; MJ de Waal "Servitudes" in R Feenstra, R Zimmerman (eds) *Das römisch-holländische recht: Fortschritte des Zivilrechts im 17 Und 18 Jahrundert* (1992) 568 578.
[81] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 76-79; MJ de Waal "Servitudes" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785 793; AJ van der Walt *The law of servitudes* (2016) 159.
[82] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 76-79; MJ de Waal "Servitudes" in R Feenstra, R Zimmerman (eds) *Das römisch-holländische recht: Fortschritte des Zivilrechts im 17 Und 18 Jahrundert*

followed by Voet[83] is within the strict confines of the Roman texts in that it only provided a mere repetition of what was already stated in the Digest.[84] Huber's approach on the other hand indicates that he might have identified a link between perpetuity and utility, however he never developed his views entirely.[85] Huber's formulation of the *perpetua causa* principle can be interpreted as follows: The service provided by the servient tenement should be capable of serving the dominant tenement without termination of the service due.[86] In this regard, it can be said that Huber might have identified a link between perpetuity and utility because he mentions that the benefit, provided by the servient tenement should be uninterrupted.

*Perpetua causa* has always been regarded as a notable feature to determine the utility of the servient tenement to the dominant tenement,[87] even though South African academic writers such as Delport and Olivier[88] only refer to the requirement in passing. A number of South African authors emphasise that there is indeed a close link between *perpetua causa* and *utilitas*.[89] This illustrates that perpetuity is not regarded as an

(1992) 567 578-580; MJ de Waal "Servitudes" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785 793; AJ van der Walt *The law of servitudes* (2016) 159.

[83] Voet 8 4 17.

[84] *D* 8 2 28. See also MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 76 and MJ de Waal "Servitudes" in R Feenstra, R Zimmerman (eds) *Das römisch-holländische recht: Fortschritte des Zivilrechts im 17 Und 18 Jahrundert* (1992) 568 578.

[85] Huber *Hedendaegse rechts-geleertheyt* 2 43 7, 8. See also MJ de Waal "Servitudes" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785 793 stipulates that Huber's motivation is more refined than the motivation of Voet, which might indicate that Huber might have seen a connection between the *perpetua causa* and *utilitas* requirements.

[86] See Huber *Heedendaegse Rechts-Geleertheyt* Boek II Kap. XLIII, 7 and 8; MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 76-78; MJ de Waal "Servitudes" in R Feenstra, R Zimmerman (eds) *Das römisch-holländische recht: Fortschritte des Zivilrechts im 17 Und 18 Jahrundert* (1992) 567 579. Groenewegen and Van der Keessel followed an indirect approach with regard to the *perpetua causa* requirement. Their approach was less dogmatic than Voet and Huber. See *D* 8 2 28; Van der Keessel *Praelectiones* 2 35 14: Full citation DG van der Keessel *Praelectiones juris hodierni ad Hugonis Grotii Introductionem ad jurisprudentiam Hollandicam* EM Meijers (ed) (1939) 2 35 14. MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 76-79; MJ de Waal "Servitudes" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785 793; AJ van der Walt *The law of servitudes* (2016) 159.

[87] *Venter v Minister of Railways* 1949 (2) SA 178 (E) 185, *Hotel De Aar v Jonordon Investment (Edms) Bpk* 1972 (2) SA 400 (A) 405, *Bisschop v Stafford* 1974 (3) SA 1 (A) 12; *Lorentz v Melle and Others* 1978 (3) SA 1044 (T) 1049; CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2 ed (2010) para 548.

[88] HJ Delport & NJJ Olivier *Sakereg vonnisbundel* 2 ed (1985) 548; CG van der Merwe *Sakereg* 2 ed (1989) 471. See also AJ van der Walt *The law of servitudes* (2016) 158.

[89] HJ Erasmus, CG van der Merwe & AH van Wyk *Lee & Honoré: Family, things and succession* 2 ed (1983) para 372; CG van der Merwe *Sakereg* 2 ed (1989) 471; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 323. Compare the comments by JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 612-613; JL Neels *Onderskeidende kenmerke by diensbaarhede* (1989) 58. JL Neels "Ewigdurende oorsaak. Die *perpetua causa*-vereiste by erfdienbaarhede: Uitoefening van 'n saaklike serwituut afhanklik van 'n positiewe dadigheid deur die

independent requirement, but as an aspect of utility. This approach is similar to the application of the vicinity requirement as shown in the previous section. It appears that the *perpetua causa* principle in South African law is taken into consideration in the establishment of praedial servitudes[90] because the pandectists' view regarding the *perpetua causa* principle as a manifestation of the *utilitas* requirement, is confirmed in some court decisions.[91] *Lorentz v Melle and Others*,[92] for instance, illustrates that the elements of *perpetua causa* and *utilitas* cannot be separated from each other.[93] The following *dictum* from the decision in *Lorentz* shows this line of reasoning:

> "It is of the essence of a praedial servitude that it burdens the land to which it relates and that it provides some *permanent* advantage to the dominant land (as distinct from serving the personal benefit of the owner thereof)".[94]

Furthermore, the judgment in *De Kock v Hänel and Others*[95] also indicates the importance of durability for the continual existence of a servitude even if the court did not express any clear statement regarding perpetuity.[96] The court did not treat perpetuity as an independent requirement and referred to the requirement in passing.[97] It held that the praedial servitude should provide a permanent advantage or benefit to the owner of the dominant tenement.[98] In this case it was argued that a servitude will terminate if by implication the benefit provided by the servient tenement existed continually, and for some or other reason does not continue any longer. In response

---

eienaar of gebruiker van die dienende erf" 2009 *Tydskrif vir die Suid-Afrikaanse Reg* 660-673 points out that when reading *D* 8 2 28, the principle in terms of which the possibility for the exercise of a praedial servitude may not depend on a positive act by the owner of the servient tenement can be regarded as one aspect of the perpetuity requirement. At 670-673 Neels arrives at the conclusion that insufficient authority exists for the reception of this principle in South African law. He states that this principle should be regarded as non-existent in the common law and that if it did exist that it had become redundant. See AJ van der Walt *The law of servitudes* (2016) 158 footnote 377.

[90] *Dreyer v Ireland* (1874) 4 Buch 193.

[91] *Venter v Minister of Railways* 1949 (2) SA 178 (E) 185 and *Hotel De Aar v Jonordon Investment (Edms) Bpk* 1972 (2) SA 400 (A) 405 concerns servitudes in restraint of trade and will be discussed in chapter 5. *Bisschop v Stafford* 1974 (3) SA 1 (A) and *Lorentz v Melle and Others* 1978 (3) SA 1044 (T) 1049 are discussed in chapter 2. See MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 89-94 and AJ van der Walt *The law of servitudes* (2016) 160 for a discussion of the *Venter* and *Hotel De Aar* cases.

[92] 1978 (3) SA 1044 (T) 1049.

[93] MJ de Waal "Servitudes" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785 794.

[94] *Lorentz v Melle and Others* 1978 (3) SA 1044 (T) 1049 (own emphasis added). *Hotel De Aar v Jonordon Investments (Edms) Bpk* 1972 (2) SA 400 (A) 405 also illustrates the importance of the link between the *perpetua causa* and *utilitas* requirement.

[95] 1999 (1) SA 994 (C) 998-1000.

[96] *De Kock v Hänel and Others* 1999 (1) SA 994 (C) 998-1000; AJ van der Walt *The law of servitudes* (2016) 163.

[97] *De Kock v Hänel and Others* 1999 (1) SA 994 (C) 999; AJ van der Walt *The law of servitudes* (2016) 163.

[98] *De Kock v Hänel and Others* 1999 (1) SA 994 (C) 999; AJ van der Walt *The law of servitudes* (2016) 164.

to this argument, the court held that even if the proposition raised by the defendant was correct, the benefit would still exist if the owner of the dominant tenement reasonably claimed and provided evidence that the benefit still existed.[99] Van der Walt states that this line of reasoning illustrates that the court does not regard the *perpetua causa* requirement as an independent requirement and that the *perpetua causa* principle will arguably only play a role in modern South African law in the sense that it informs the requirement of utility.[100] This means that perpetuity or durability will always be regarded as a relevant factor for the continued existence of a praedial servitude to the extent that it would terminate when the servient tenement's utility for the dominant tenement should come to an end.[101] This is arguably the strongest argument in favour of a version of a durability test to accompany the *utilitas* requirement since it is one of the foundational requirements for a praedial servitude, namely, it should benefit the successive owners of the dominant tenement and not just the current owner of the dominant tenement. If the benefit or utility that the servitude provides is merely momentary, it could be an indication that the servitude serves the interests of the current owner and not the interests of the successive owners or dominant tenement.[102] If uncertainty exists from the outset that the beneficial characteristic of the servient tenement will not endure and if the utility of the servitude is momentary, the *utilitas* requirement would arguably not be regarded as met and a praedial servitude cannot be established.[103] In such a case a personal servitude might be more appropriate.[104]

The precise role of the *perpetua causa* principle remains unclear and it can also be said that it becomes less clear due to the flexible approach adopted by the courts pertaining to the importance of durability for the creation or establishment of a praedial servitude.[105] It still remains a contested issue whether a relative lack of durability of the benefits that a servient tenement are supposed to provide means that a praedial servitude cannot be established. In this regard, De Waal argues that even though perpetuity should not be regarded as an independent requirement for the

[99] *De Kock v Hänel and Others* 1999 (1) SA 994 (C) 999; AJ van der Walt *The law of servitudes* (2016) 164.
[100] AJ van der Walt *The law of servitudes* (2016) 164.
[101] AJ van der Walt *The law of servitudes* (2016) 164.
[102] AJ van der Walt *The law of servitudes* (2016) 164.
[103] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 93, 97; MJ de Waal "*Perpetua causa* (permanente grondslag) as vestigingsvereiste vir grondserwitute" (1991) 54 *Tydskrif vir Heedendaagse Romeins-Hollandse Reg* 716 736; AJ van der Walt *The law of servitudes* (2016) 165.
[104] AJ van der Walt *The law of servitudes* (2016) 164.
[105] AJ van der Walt *The law of servitudes* (2016) 164.

establishment of a praedial servitude, the relative durability of the benefit that it provides for the dominant tenement should still be regarded as relevant for the creation and the continued existence of the praedial servitude.[106] The likelihood that the characteristic of the servient tenement that renders the servitude useful might terminate in the future does not imply that the servitude will not be regarded as durable and therefore no longer useful.[107] The *perpetua causa* requirement would be regarded as being met, if at the time when the servitude is created, the characteristic appears relatively durable and useful, even if the possibility exists that the situation could change in the future.[108] The Deeds Registries Act makes provision for circumstances of this kind by authorising the registration of servitudes for a limited period.[109] In South African law it is possible to register a praedial servitude either in perpetuity or for a limited period and it is also possible to establish a praedial servitude subject to a resolutive term or condition.[110] Even if the servitude is only for a limited time, it could still be required that it should be useful.

Sonnekus and Neels are of the view that perpetuity should not play a role in South African law any longer.[111] Neels, in particular, points out that the perception that perpetuity is a general requirement for the establishment of a praedial servitude originates from the confusion of *perpetua causa* and the distinction between continuous and intermittent servitudes.[112] It is therefore arbitrary to consider that a servitude might be available for a limited period of time when deciding whether a

---

[106] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 96-97; MJ de Waal "*Perpetua causa* (permanente grondslag) as vestigingsvereiste vir grondserwitute" (1991) 54 *Tydskrif vir Heedendaagse Romeins-Hollandse Reg* 717 736-737; AJ van der Walt *The law of servitudes* (2016) 164.

[107] AJ van der Walt *The law of servitudes* (2016) 164-165.

[108] AJ van der Walt *The law of servitudes* (2016) 165.

[109] Section 75(1) of the Deeds Registries Act 47 of 1937. See also AJ van der Walt *The law of servitudes* (2016) 165.

[110] Section 75(1) of the Deeds Registries Act 47 of 1937. See also AJ van der Walt *The law of servitudes* (2016) 162, 168. Modern German law abandoned the perpetuity requirement. The element of durability of a servitude is embodied exclusively within the utility requirement as a praedial servitude would be meaningless if the utility thereof is not enduring. Furthermore, a temporary servitude or a servitude subject to a resolutive condition is possible in German law. For the legal position in German law, see DU Otto "Dienstbarkeiten" in H Grziwotz, A Keukenschrijver & G Ring (eds) *NomosKommentar BGB Sachenrecht* vol 3 § 854-1296 3 ed (2013) 955-1181 994 (para 18). See also MJ de Waal *Die vereistes vir die vestiging van grondserwitte in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch (1989) 83-85.

[111] JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 613. See AJ van der Walt The law of servitudes (2016) 166.

[112] JL Neels *Onderskeidende kenmerke by diensbaarhede* (1989) 65-70; JL Neels "Ewigdurende oorsaak. Die *perpetua causa*-vereiste by erfdiensbaarhede: Behoefte van die heersende erf en geskiktheid van die dienende erf (deel 1)" 2010 *Tydskrif vir die Suid-Afrikaanse Reg* 73 75-78; AJ van der Walt *The law of servitudes* (2016) 166.

servitude can exist.[113] Therefore, although the reason for creating the servitude must be perpetual, the servitude need not exist in perpetuity. Sonnekus and Neels argue that it is illogical to restrict the creation of burdens on land in the context of the overriding purpose which the *perpetua causa* serves by preferring servitudes that inflict a permanent or more enduring burden to servitudes that inflict a lighter burden as a result of the limited duration thereof.[114] It appears from their argument that a servitude should be recognised even if the duration of the potential servitude is limited. The problem with this argument is that in effect more servitudes will be created, which is inconsistent with the idea of safeguarding the anti-fragmentation of landownership.

Van der Walt in turn argues that the argument of Sonnekus and Neels relating to the extent of the burden inflicted by the servitude is unconvincing.[115] This is because the goal of post-feudalism's restrictions on unnecessary real burdens on land pertain to the overall, systemic effect of a proliferation of real burdens on land and not on the enduring effect that an individual servitude-like entitlement has on the servient tenement owner affected by it.[116] Van der Walt states that it is true that the general anti-fragmentation goal of preventing unnecessary burdens on land does have an influence on specific interpretations of servitude law principles that pertain to the burden imposed by an individual servitude. An example of such an interpretation of a specific principle in servitude law is that if it becomes doubtful whether a servitude exists, it can be presumed that no servitude exists. Furthermore, if it is proven that a servitude exists but it is uncertain whether the nature of the servitude is personal or praedial, it will be presumed that the servitude is personal rather than praedial, as a personal servitude is less burdensome than a praedial servitude.[117] Therefore, the law

---

[113] JL Neels *Onderskeidende kenmerke by diensbaarhede* (1989) 58, 63, 74; JL Neels "Naburigheid as vereiste vir erfdiensbaarhede" 1990 *Tydskrif vir die Suid-Afrikaanse Reg* 447 459-461; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 613; AJ van der Walt *The law of servitudes* (2016) 166 points out that Neels makes the arbitrariness argument with regard to the availability of a personal grant of consent to use the land located between the servient and the dominant tenement, over which no similar servitude exists. See JL Neels "Ewigdurende oorsaak. Die *perpetua causa*-vereiste by erfdiensbaarhede: Behoefte van die heersende erf en geskiktheid van die dienende erf (deel 1)" 2010 *Tydskrif vir die Suid-Afrikaanse Reg* 73-85; JL Neels "Ewigdurende oorsaak. Die *perpetua causa*-vereiste by erfdiensbaarhede: Behoefte van die heersende erf en geskiktheid van die dienende erf (deel 2)" 2010 *Tydskrif vir die Suid-Afrikaanse Reg* 331-345; AJ van der Walt *The law of servitudes* (2016) 166.

[114] JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 613; JL Neels "Naburigheid as vereiste vir erfdiensbaarhede" 1990 *Tydskrif vir die Suid-Afrikaanse Reg* 447 461; AJ van der Walt *The law of servitudes* (2016) 166.

[115] AJ van der Walt *The law of servitudes* (2016) 166.

[116] AJ van der Walt *The law of servitudes* (2016) 166.

[117] AJ van der Walt *The law of servitudes* (2016) 166-167. See also 192-224 for a detailed discussion regarding the interpretation and presumption pertaining to servitudes.

always opts for the interpretation that presumes the lesser/lightest burden. However, Van der Walt argues that Sonnekus and Neels did not have the aforementioned context in mind. Sonnekus and Neels's point of view is that a temporary praedial servitude has the effect of imposing a lesser burden on the servient tenement than a permanent praedial servitude would. Therefore, they argue that the establishment of temporary praedial servitudes should not be prohibited simply on the basis that the literal interpretation of the *perpetua causa* requirement provides that praedial servitudes should inflict a permanent burden on the servient tenement.[118] The argument of Sonnekus and Neels confuses the systemic goal of preventing the proliferation of unnecessary land burdens with the doctrinal presumption that is in favour of an interpretation of a servitude-creating agreement that inflicts the lightest possible burden on the servient tenement.[119] The systemic goal and the doctrinal presumption aims to promote the absoluteness of ownership, however it does so on different levels and in different ways. A large number of short-term servitudes may do exactly what the anti-fragmentation principle aims to counter, namely that it erodes the absoluteness of ownership in land. Sonnekus and Neels's approach justifies a proliferation of a large number of short-term praedial servitudes because it imposes a light burden on the servient tenement. Therefore, Van der Walt argues that due to the fact that South Africa does not have a *numerus clausus* of praedial servitudes, De Waal is closer to the mark regarding the *perpetua causa* requirement in that he expects praedial servitudes to satisfy the *utilitas* requirement on a relatively durable basis thereby setting the bar reasonably high for the establishment of new praedial servitudes. Furthermore, Van der Walt states that the distinction between the different views held by Sonnekus, Neels and De Waal makes little difference because it is likely that the subtraction from the *dominium* test which precedes the application of the *utilitas* requirement of a praedial servitude[120] might in actual fact preclude the registration of praedial servitudes that serves the dominant tenement only in a transient way.[121] Therefore, the current legal practice of the Deeds Registries will confirm the approach proposed by De Waal which is expecting praedial servitudes to satisfy the *utilitas* requirement on a relatively durable basis.[122]

[118] AJ van der Walt *The law of servitudes* (2016) 167.
[119] AJ van der Walt *The law of servitudes* (2016) 167.
[120] See *Lorentz v Melle and Others* 1978 (3) SA 1044 (T) 1049, 1052 and 1055.
[121] AJ van der Walt *The law of servitudes* (2016) 167-168.
[122] AJ van der Walt *The law of servitudes* (2016) 167, 168.

To conclude, Van der Walt states that there is an implication if the *perpetua causa* principle is not treated as an independent requirement but rather as an aspect of utility.[123] This implication holds that the requirement that a perpetual benefit should exist will not be interpreted literally. Instead, in view of the function of the *utilitas* requirement, perpetuity would be described as *relative durability* as opposed to perpetual durability.[124] Therefore, the quality of the servient tenement, which renders the servitude as useful to the dominant tenement should not literally be perpetual. All that is required, is that a probability should exist that the servient tenement will be able to benefit the dominant tenement on a permanent basis and not temporarily or short-lived.[125] Arguably each case should be dealt with in accordance with its own facts and in accordance with the nature of the particular praedial servitude.[126] If the benefit for the servient tenement is temporarily absent, the servitude is merely suspended until it becomes possible to exercise the servitude again.[127] Thus, in the same way, that a close link exists between the *vicinitas* principle and the *utilitas* principle, a close link also exists between the *perpetua causa* and *utilitas* principle.

### *3 2 2 5 Utilitas*

#### 3 2 2 5 1 Introduction

As illustrated above, the *vicinitas* and *perpetua causa* requirements can only be interpreted with reference to the *utilitas* requirement which is a fundamental requirement for the establishment of a praedial servitude. South African courts and academic authors seem to agree that it is an essential requirement for the existence of a praedial servitude and that the servient tenement should benefit the dominant tenement although the extent of the application of the requirement differs.[128] The

[123] AJ van der Walt *The law of servitudes* (2016) 161.
[124] AJ van der Walt *The law of servitudes* (2016) 161.
[125] AJ van der Walt *The law of servitudes* (2016) 161-162.
[126] MJ de Waal "*Perpetua causa* (Permanente grondslag) as vestigingsvereiste vir grondserwitute" (1991) 54 *Tydskrif vir Heedendaagse Romeins-Hollandse Reg* 717.
[127] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 97; MJ de Waal "*Perpetua causa* (permanente grondslag) as vestigingsvereiste vir grondserwitute" (1991) 54 *Tydskrif vir Heedendaagse Romeins-Hollandse Reg* 717 737; CG van der Merwe *Sakereg* 2 ed (1989) 471; AJ van der Walt *The law of servitudes* (2016) 163.
[128] JL Neels "Erfdiensbaarhede: Nut vir heersende erf" 1988 *Tydskrif vir die Suid-Afrikaanse Reg* 527 527-528; CG van der Merwe *Sakereg* 2 ed (1989) 469; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 585-592; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of*

*utilitas* requirement plays a crucial role with regard to the question whether new praedial servitudes can be established. As will be briefly indicated in this section, the biggest problem with recognition of trading rights as praedial servitudes is whether they comply with the *utilitas* requirement.[129] In the absence of utility, it seems more likely that a personal servitude is possible, rather than a praedial servitude.

There are a number of problems that can potentially be identified with regard to trading rights and the *utilitas* requirement.[130] In terms of positive praedial trading rights, the owner of the dominant tenement is entitled to trade on the servient tenement or to use the servient tenement as an outlet for her products. The question that arises is whether such rights serve the dominant tenement and not the mere personal interests of a specific person so that a positive praedial servitude can be established.[131] Furthermore, problems also exist with trading rights where owners of the servient tenement are prohibited from trading on their own land.[132] The purpose of a negative trading right is to protect the owner of the dominant tenement against precarious competition on the servient tenement. However, the question that arises regarding the *utilitas* requirement is whether praedial servitudes can serve as a mechanism to restrain trade from taking place on the servient tenement and whether it can serve the interests of the land and not merely the interests of a specific person.[133] If so, the question that further arises is what boundaries should be set for the establishment of such servitudes if the creation is possible at all given its establishment requirements especially the *utilitas* requirement.

Therefore, it is important to analyse the *utilitas* requirement to be able to answer these problematic questions. The subsequent section will determine whether sufficient criteria exist in South African law to be able to judge whether a positive and negative trading right will enhance the utility of the dominant tenement (and the successors in

*property* 5 ed (2006) 323; AJ van der Walt *The law of servitudes* (2016) 127-150; JL Neels "Erfdiensbaarhede: Nut vir heersende erf" 1988 *Tydskrif vir die Suid-Afrikaanse Reg* 527 527-528.

[129] The *utilitas* principle in relation to trading rights will be discussed extensively in chapters 4 and 5.

[130] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 100-101.

[131] Chapter 4 wil analyse the circumstances under which a positive praedial trading servitude can and will not be registered. Chapter 6 will provide alternative mechanisms for regulating positive trading rights, where there is no compliance with the *utilitas* requirement.

[132] See chapter 5.

[133] Chapter 5 will discuss the circumstances under which a negative praedial servitude in restraint of trade can potentially come into existence and be registered.

title) or whether it will only enhance the interests of a specific owner.[134] If such criteria do exist and if it has the effect of enhancing the utility of a specific piece of land, the *utilitas* requirement would be satisfied, arguably making it possible to recognise these trading rights as praedial servitudes.

3 2 2 5 2 Application of the *utilitas* requirement in South African law

The *utilitas* requirement encompasses the idea that the servient tenement may only be burdened to the extent that the owner of the dominant tenement benefits in her capacity as the owner of the land.[135] The servient tenement must therefore enhance the usefulness of the dominant tenement.[136] The utility of the servitude for the dominant tenement does not only have to refer to the current use of the property.[137] It could also refer to future exploitation of the dominant tenement. However, any reference to the future use of the property should find support in a realistic potential that the specific use will probably be realised.[138] Three possible interpretations exist in literature for the interpretation of the *utilitas* requirement, namely an exceedingly narrow interpretation, a somewhat wider interpretation and an even wider interpretation.[139]

An exceedingly narrow interpretation of the *utilitas* requirement is satisfied only if a specific servitude is of *direct benefit* to the dominant tenement in accordance with the tenement's natural character and condition. This interpretation was followed in Roman law where rural servitudes were intended to improve the agricultural use of

[134] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 100.
[135] AJ van der Walt *The law of servitudes* (2016) 127.
[136] CG van der Merwe *Sakereg* 2 ed (1989) 469; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 585-592; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 323; AJ van der Walt *The law of servitudes* (2016) 127.
[137] *D* 8 1 19; MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 103; CG van der Merwe *Sakereg* 2 ed (1989) 469. See also AJ van der Walt *The law of servitudes* (2016) 128.
[138] *D* 8 1 19; MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 103; CG van der Merwe *Sakereg* 2 ed (1989) 469. See also AJ van der Walt *The law of servitudes* (2016) 128.
[139] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 101. The distinction between the three interpretations pertaining to South African law is first mentioned in CG van der Merwe "Die nutsvereiste by erfdiensbaarhede" in DJ Joubert (ed) *Petere Fontes: LC Steyn Gedenkbundel* (1980) 163 164-165. See further JL Neels *Onderskeidende kenmerke by diensbaarhede* (1989) 3; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 587-588; AJ van der Walt *The law of servitudes* (2016) 128.

rural land.[140] The benefit that is derived from the servitude had to be linked directly to the normal, agricultural use of the dominant land in its natural condition.[141] Neels argues that it is not reasonable to adopt the narrow approach.[142] The narrow interpretation of the *utilitas* requirement regards the utility as being satisfied only if a specific servitude is of direct benefit to the dominant tenement in accordance with the tenement's natural character and condition. However, the development and appointment of an erf can only be established by means of human intervention. The nature of an erf is ultimately dependent on human activity.[143] It is in this regard that Neels correctly asserts that the somewhat wider interpretation of the *utilitas* requirement places a bigger premium on human initiative, acumen and activity than the narrow approach and may therefore be more appropriate.

The somewhat wider interpretation envisages that the servitude should increase the utility or usefulness of the dominant tenement in accordance with the tenement's economic, industrial or professional purpose (and not only with regard to its natural condition or to its agricultural use as mentioned above).[144] De Waal points out that this somewhat wider interpretation is not completely new and that the *utilitas* requirement had a different meaning in the context of rural and urban servitudes for a long time.[145] Roman jurists already demonstrated a relaxed interpretation of the *utilitas* requirement where new servitudes were developed in the urban environment.[146] A few of these servitudes did not strictly advance the utility of the dominant tenement directly, but it made more enjoyable use of the dominant tenement possible. In this way it expanded

---

[140] *D* 8 1 8. See MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 101; AJ van der Walt *The law of servitudes* (2016) 128.

[141] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 103-104; AJ van der Walt *The law of servitudes* (2016) 128.

[142] JL Neels "Erfdiensbaarhede: Nut vir heersende erf" 1988 *Tydskrif vir die Suid-Afrikaanse Reg* 527 531.

[143] JL Neels "Erfdiensbaarhede: Nut vir heersende erf" 1988 *Tydskrif vir die Suid-Afrikaanse Reg* 527 531.

[144] AJ van der Walt *The law of servitudes* (2016) 129.

[145] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 99. See CG van der Merwe "Die nutsvereiste by erfdiensbaarhede" in DJ Joubert (ed) *Petere Fontes: LC Steyn Gedenkbundel* (1980) 163 166-167. See also AJ van der Walt *The law of servitudes* (2016) 129.

[146] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 106, refers to servitudes that secured access to natural right, the right to let water drip on neighbouring land; to rest beams in the wall of a neighbouring house; to overhang neighbouring land and to secure an existing view over neighbouring land. De Waal indicates that Cujacius in his commentary on *D* 8 1 8 distinguished between servitudes that serve the *utilitas* requirement and those that also serve the pleasantness and delight of use of the dominant tenement. See further CG van der Merwe "Die nutsvereiste by erfdiensbaarhede" in DJ Joubert (ed) *Petere Fontes: LC Steyn Gedenkbundel* (1980) 163 171. See also AJ van der Walt *The law of servitudes* (2016) 129.

the *utilitas* requirement in the urban environment to include aesthetic advancements as well.[147] As a result, a strictly utilitarian agricultural servitude, such as the right to draw water from the servient tenement, could also be used for pleasurable and aesthetic purposes on urban land such as the right to draw water for a fish pond or a fountain.[148] In the Humanist writings of Cujacius, praedial servitudes (mostly rural) satisfied the *utilitas* requirement if it served the use of the dominant tenement in accordance with its natural condition.[149] Other (mostly urban) praedial servitudes satisfied the *utilitas* requirement as a result of them supporting the enjoyment that was associated with the use of the dominant tenement.[150] Even though the somewhat wider interpretation was favoured, the narrow interpretation of the *utilitas* requirement was never abandoned.[151] Roman-Dutch authors were inconsistent for the reason that some held on to the strict Roman interpretation,[152] while others followed a wider, more modern humanist view.[153]

---

[147] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 106-107: referring to servitudes that secured the view over neighbouring property, access to natural light and the right to rest beams in the wall of the neighbouring house for a promenading balcony. See further CG van der Merwe "Die nutsvereiste by erfdiensbaarhede" in DJ Joubert (ed) *Petere Fontes: LC Steyn Gedenkbundel* (1980) 163 166; AJ van der Walt *The law of servitudes* (2016) 129 footnote 259.

[148] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 107. See also AJ van der Walt *The law of servitudes* (2016) 130.

[149] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 106. See footnote 176 below.

[150] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 106, 113-114 indicates that Cujacius in his commentary on *D* 8 1 8 distinguished between servitudes that serve the *utilitas* requirement and servitudes that serve the pleasantness of use of the dominant tenement.

[151] See MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 114. See further CG van der Merwe "Die nutsvereiste by erfdiensbaarhede" in DJ Joubert (ed) *Petere Fontes: LC Steyn Gedenkbundel* (1980) 163 171; AJ van der Walt *The law of servitudes* (2016) 129-130.

[152] Voet 8 1 8 adopts a conservative approach in that servitudes have to serve the benefit of the dominant tenement and not the delectation of a specific individual. Voet argues that a servitude of footpath giving access to a dominant tenement is different from a right to promenade on another individual's land because the delectation of an individual could not create a praedial servitude. Instead it could create a personal servitude: Voet 8 1 1, 8 3 1, 8 3 11, 8 4 13; MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 115-116. De Waal also indicates that Huber *Hedendaegse rechts-geleertheyt* 2 43 10, 2 42 13-14 and other Roman-Dutch authors followed Voet's perspective in this regard: MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 117. Voet only approves of servitudes that promote pleasurable use of the dominant tenement if it also simultaneously serve the narrow interpretation of the *utilitas* requirement. See also AJ van der Walt *The law of servitudes* (2016) 131.

[153] Van der Keessel follows Cujacius with regard to the validity of urban praedial servitudes that are intended to serve the pleasurable or aesthetic interests in the dominant tenement: Van der Keessel *Institutionum* 2 3 8; MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 117. See also AJ van der Walt *The law of servitudes* (2016) 131. See footnote 170 above.

An even wider interpretation of the *utilitas* requirement entails that it is sufficient if the servitude increases the financial value of the dominant tenement in some way,[154] rather than requiring physical use or general increase in usefulness. The only example that can be found in the Roman-Dutch law *possibly* illustrating this wider interpretation of the *utilitas* requirement can be found in Voet 8 4 15, which states that:[155]

> "[s]o likewise, whatever rights are granted to a tenement such as will bring enjoyment also to the owner of the tenement and to others (for instance, a right of waterleading, not with a view to the irrigation of land but for leaping fountains, for the welcome play of gently murmuring waterfalls, for baths and many other such like things) will not be praedial servitudes *for any other reason than that the price of the tenement*, which per chance is likely to serve only purposes of enjoyment, is raised because of them".

However, De Waal finds little or no support for the third interpretation of the *utilitas* requirement in the development of the Roman-Dutch law and he argues that Voet[156] and Huber[157] are insufficient as authority for the even wider interpretation.[158] There is no evidence in the text written by Huber indicating that he was of the view that the financial value of the dominant tenement should be increased to enable the establishment of a praedial servitude.[159] Furthermore, Voet's view regarding the even wider interpretation is strange and isolated to be regarded as convincing.[160] Other South African academic authors are also not in favour of court judgments that rely on such a wide interpretation of the *utilitas* requirement.[161] Their reasons for criticising the third interpretation of the *utilitas* requirement is that this approach will have the effect of negating the *utilitas* requirement and may result in unbearable burdens on servient tenements and, in turn, will prevent a healthy land market.[162]

---

[154] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 101.
[155] Voet 8 4 15. See MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 120.
[156] 8 4 15.
[157] Huber *Hedendaegse rechts-geleertheyt* 2 43 10.
[158] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 120-121; AJ van der Walt *The law of servitudes* (2016) 131.
[159] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 120-121.
[160] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 121.
[161] CG van der Merwe "Die nutsvereiste by erfdiensbaarhede" in DJ Joubert (ed) *Petere Fontes: LC Steyn gedenkbundel* (1980) 163 174-175; JL Neels *Onderskeidende kenmerke by diensbaarhede* (1989) 5; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 599-601; AJ van der Walt *The law of servitudes* (2016) 131.
[162] CG van der Merwe "Die nutsvereiste by erfdiensbaarhede" in DJ Joubert (ed) *Petere Fontes: LC Steyn gedenkbundel* (1980) 163 174-175; JL Neels *Onderskeidende kenmerke by diensbaarhede* (1989) 5; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 599-601; AJ van der Walt *The*

In South African law, there are only a few cases that fit the logic of the very narrow Roman law approach[163] to the *utilitas* requirement, and only one case that tends toward the widest approach to the requirement,[164] which seems to suggest that South African law might lean more towards the second, somewhat wider, approach as it was developed in romanist and humanist jurisprudence.[165] Therefore, a clear utility link between the servient tenement and the dominant tenement should exist, which does not only focus on the natural condition of the land or on narrow agricultural use of the land, but which also focuses on the economic enhancement of the dominant tenement.[166] However, it should be noted that the somewhat wider interpretation of the *utilitas* requirement was never expressly formulated by the courts, nor did the courts indicate that the somewhat wider interpretation is preferable to the other interpretations of the *utilitas* requirement.[167] Van der Merwe nonetheless argues that certain decisions cannot be explained other than in terms of the somewhat wider interpretation of the *utilitas* requirement.[168]

---

*law of servitudes* (2016) 131. See chapter 5 part 5 2 2 for an analysis of *Hollman and Another v Estate Latre* 1970 (3) SA 638 (A) where Steyn CJ wrongfully acknowledges that the *utilitas* requirement will be complied with if the financial value of the dominant tenement is increased in line with this wide interpretation.

[163] *Badenhorst v Joubert and Others* 1920 TPD 100; *Landman v Daverin* (1881) 2 EDC 1 7; *R v Thompson* 1933 EDL 343 344. See CG van der Merwe "Die nutsvereiste by erfdiensbaarhede" in DJ Joubert (ed) *Petere Fontes: LC Steyn Gedenkbundel* (1980) 163 168; AJ van der Walt *The law of servitudes* (2016) 132.

[164] *Hollmann and Another v Estate Latre* 1970 (3) SA 638 (A).

[165] *D* 8 1 8, 8 2 2, 8 2 3, 8 2 15; 8 5 8 1; F Schulz *Classical Roman law* (1951) 394; S Sutro *Leerboek der Instituten* (1878) 349; *D* 43 20 3; J Cujacius *Opera (ad Parisiesnem Fabrotianam Editionem)* (1839) (Tomus Septimus): commentary on *D* 8 1 8. JC van Oven *Leerboek van Romeinsch Privaatrecht* (1948) 145. See also CG van der Merwe "Die nutsvereiste by erfdiensbaarhede" in DJ Joubert (ed) *Petere Fontes: LC Steyn Gedenkbundel* (1980) 163 172; MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 106-109.

[166] CG van der Merwe "Die nutsvereiste by erfdiensbaarhede" in DJ Joubert (ed) *Petere Fontes: LC Steyn Gedenkbundel* (1980) 163-176; CG van der Merwe *Sakereg* 2 ed (1989) 470-471; MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 298, 302-303; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 588; AJ van der Walt *The law of servitudes* (2016) 133.

[167] AJ van der Walt *The law of servitudes* (2016) 132.

[168] CG van der Merwe "Die nutsvereiste by erfdiensbaarhede" in DJ Joubert (ed) *Petere Fontes: LC Steyn Gedenkbundel* (1980) 163 172: refers to case law confirming servitudes in restraint of trade, namely *Tonkin v Van Heerden* 1935 NPD 589; *Venter v Minister of Railways* 1949 (2) SA 178 (E); *Hollmann and Another v Estate Latre* 1970 (3) SA 638 (A). For a detailed discussion of these cases, see chapter 5 part 5 2 2. MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 194-195: agrees that South African courts have adopted the slightly wider approach, however he argues that the two cases (*Tonkin* and *Venter*) cited by Van der Merwe should not be recognised as correct applications of the *utilitas* requirement as the courts went too far and in actual fact abandoned the requirement. Both De Waal and Van der Merwe criticises the *Hollman* case in that it went too far in the direction of flexibility. See further JL Neels *Onderskeidende kenmerke by diensbaarhede* (1989) 5-7; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 588; AJ van der Walt *The law of servitudes* (2016) 132, 141. See also MJ de

Generally speaking, academic scholars maintain that South African law upholds the principle that a servitude should serve the use of the dominant tenement and not merely the personal delight of a particular person.[169] Van der Walt states that it remains unclear how the line should be drawn between servitudes that advance the utility of the dominant tenement and those that satisfy the personal delight of an individual owner.[170] However, there is some agreement on the list of criteria that should be considered in making the distinction.[171] The following criteria are regarded as important: the utility which the owner receives from the servitude must be as a result of the use of the dominant tenement;[172] the entitlements that the dominant tenement owner is allowed to exercise on the servient tenement in terms of the servitude must benefit the dominant tenement and not merely the person who is the owner at a specific point;[173] the benefit which the dominant tenement derives from the servitude can be aesthetic in nature and does not have to be economic;[174] a praedial servitude may not grant the dominant owner an unlimited entitlement to remove products from the servient land;[175] the two tenements which are linked by the servitude must be located in relation to each other to enable the praedial servitude to promote the utility or benefit of the dominant tenement;[176] and that the utility derived from the praedial servitude

Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 101.

[169] CG Hall *CG Hall & EA Kellaway Servitudes* 3 ed (1973) 2; CG van der Merwe "Die nutsvereiste by erfdiensbaarhede' in DJ Joubert (ed) *Petere Fontes: LC Steyn gedenkbundel* (1980) 163 175; HJ Erasmus, CG van der Merwe & AH van Wyk *RW Lee & AM Honoré: Family, things and succession* 2 ed (1983) para 372; HJ Delport & NJJ Olivier *Sakereg vonnisbundel* 2 ed (1985) 548; CG van der Merwe *Sakereg* 2 ed (1989) 470-471; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 589; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* 5 ed (2006) 323. See MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 169. See also AJ van der Walt *The law of servitudes* (2016) 132.

[170] AJ van der Walt *The law of servitudes* (2016) 133.

[171] AJ van der Walt *The law of servitudes* (2016) 133. Some academic scholars favour a combined approach that takes all the factors into account as these factors apply differently in different contexts. Most authors agree that the outcome of the application of these criteria will be affected at times by considerations not included in the list of criteria.

[172] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 203; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 589-590.

[173] CG Hall *CG Hall & EA Kellaway Servitudes* 3 ed (1973) 2; CG van der Merwe "Die nutsvereiste by erfdiensbaarhede" in DJ Joubert (ed) *Petere fontes: LC Steyn gedenkbundel* (1980) 163 165; HJ Delport & NJJ Olivier *Sakereg* 2 ed (1989) 470-471; MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 203; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 589; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* 5 ed (2006) 323; AJ van der Walt *The law of property* (2016) 135.

[174] AJ van der Walt *The law of property* (2016) 135-136.

[175] AJ van der Walt *The law of property* (2016) 136.

[176] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 203-204, 298; JC Sonnekus & JL Neels *Sakereg*

does not have to be permanent, although, it must be durable.[177] Van der Walt states that it is clear that the purpose of the abovementioned criteria is to ensure that some servitudal benefits could be established as personal but not praedial servitudes.[178]

Van der Merwe and De Waal support the idea that a combination of factors or criteria should be taken into consideration.[179] Sonnekus and Neels in turn argue that all the relevant criteria for the *utilitas* requirement should be taken into consideration.[180] Sonnekus and Neels submit that the abovementioned seven criteria cannot always explain why certain servitudes will be allowed and others not. Therefore, they mention that policy considerations not included in these criteria will sometimes have to play a role.[181] Policy considerations that they list include a principle that certain forms of servitudes should not be allowed, for example: where the content of praedial servitudes resembles personal servitudes like usufruct and use; servitudes that should be exercised inside of a residential property on the servient tenement; and servitudes that have the effect of prohibiting the maintenance of buildings on the servient land.[182]

De Waal suggests that the praedial servitude must increase the benefit that use and exploitation of the dominant tenement produces on a durable basis for everyone who uses the land in accordance with its natural or acquired condition.[183] The destination given to the dominant tenement by its owners as a result of the development and appointment of the dominant tenement is also taken into consideration to determine whether a servitude serves the use of the land by all the

---

*vonnisbundel* 2 ed (1994) 605; CG van der Merwe *Sakereg* 2 ed (1989) 470; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* 5 ed (2006) 323; AJ van der Walt *The law of servitudes* (2016) 137.

[177] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 204; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 610-612; CG van der Merwe *Sakereg* 2 ed (1989) 477; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* 5 ed (2006) 323; AJ van der Walt *The law of servitudes* (2016) 138.

[178] AJ van der Walt *The law of servitudes* (2016) 138.

[179] CG van der Merwe "Die nutsvereiste by erfdiensbaarhede" in DJ Joubert (ed) *Petere Fontes: LC Steyn Gedenkbundel* (1980) 163-176; MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 203-209; AJ van der Walt *The law of servitudes* (2016) 134.

[180] JL Neels *Onderskeidende kenmerke by diensbaarhede* (1989) 7-17; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 588-592; AJ van der Walt *The law of servitudes* (2016) 134.

[181] JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 591-592; MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 204-206; AJ van der Walt *The law of servitudes* (2016) 138.

[182] JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 591-592; AJ van der Walt *The law of servitudes* (2016) 137-138.

[183] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 202-209, 298, 302-303; AJ van der Walt *The law of servitudes* (2016) 134.

potential subsequent owners of the dominant tenement or merely the delight and whim of the current owner of the dominant tenement.[184] Examples of a dominant tenement being regarded as developed and appointed for a specific purpose includes specific infrastructure or structures such as a hotel, a factory or a residential home.[185] The validation for the establishment of a servitude appears to be stronger, if the servitude intended to support or benefit economic uses of the dominant tenement.[186] In this regard, the dominant tenement should be developed and appointed in the form of purpose-specific infrastructure, buildings or installations that make that particular use of the land possible.[187] This infrastructure should characterise the property with regard to that specific use and ensure that the property is indeed being used for that purpose.[188]

In light of the flexible, somewhat wider interpretation of the *utilitas* requirement, it appears that trading rights can qualify as servitudes, provided that the servitude is clearly related to the use and enjoyment of the dominant tenement in accordance with the actual development, appointment and use of the dominant tenement for a specific purpose.[189] These considerations will be crucial to consider in chapters 4 and 5 when specific examples of trading servitudes are analysed to determine whether they comply with the *utilitas* requirement.

### *3 2 2 6 Servitus in faciendo consistere nequit*

Another establishment requirement for praedial servitudes is the passivity principle.[190] A limited real right has the effect of diminishing the *dominium* of the owner in the sense

[184] AJ van der Walt *The law of servitudes* (2016) 140.
[185] CG van der Merwe 'Die nutsvereiste by erdiensbaarhede' in DJ Joubert (ed) *Petere fontes: LC Steyn gedenkbundel* (1980) 163 171.
[186] AJ van der Walt *The law of servitudes* (2016) 140.
[187] AJ van der Walt *The law of servitudes* (2016) 140.
[188] AJ van der Walt *The law of servitudes* (2016) 140.
[189] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 168-209. See AJ van der Walt "*Novel servitudes Liber Amicorum – Essays in honour of JC Sonnekus Sakereg*" 2017 *Tydskrif vir die Suid-Afrikaanse Reg* 408 413. See also chapters 4 and 5.
[190] *D* 8 1 15 1 sets out the passivity principle as it applied in Roman law. See also CG Hall *CG Hall & EA Kellaway Servitudes* 3 ed (1973) 1-2; CG van der Merwe *Sakereg* 2 ed (1989) 471-477; MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 210-297; MJ de Waal "Die passiwiteitsvereiste by grondserwitute en die skepping van positiewe serwituutverpligtinge" 1991 *Tydskrif vir die Suid-Afrikaanse Reg* 233-249; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 550-551, 613; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 324-325; JL Neels "Ewigdurende

that it either obliges the owner of the servient tenement to endure some act being performed on his tenement, or it may prevent the owner from exercising her right of ownership.[191] However, the owner of the servient tenement can never be compelled to perform a positive duty in terms of the servitude.[192] The reason for this is that the rendering of a performance is a characteristic of a personal right.[193] Obligations imposing a duty on the owner of the servient tenement to do something could be done by means of a contractual agreement. However, those obligations are limited to the contract from which it originates and as a result thereof it is a personal right by nature and not a real right.[194]

Van der Merwe states that the requirement that servitudes should not inflict positive obligations on the owner of the servient tenement, originates from the anti-fragmentation desire to protect landownership against unnecessary burdens that could hinder commercial liberty.[195] The historical origin of the requirement not to inflict positive obligations on the owner of the servient tenement can be found in the Digest.[196] As a result of the text of the Digest, the requirement of passivity is accepted as a basic principle of the law of servitudes.[197] Germanic law sometimes placed a

---

oorsaak. Die *perpetua causa*-vereiste by erdiensbaarhede: Uitoefening van 'n saaklike serwituut afhanklik van 'n positiewe dadigheid deur die eienaar of gebruiker van die dienende erf" 2009 *Tydskrif vir die Suid-Afrikaanse Reg* 660-673; AJ van der Walt *The law of servitudes* (2016) 169-170.

[191] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 210-297; MJ de Waal "Servitudes" in R Feenstra, R Zimmerman (eds) *Das römisch-holländische recht: Fortschritte des Zivilrechts im 17 Und 18 Jahrundert* 567 583; MJ de Waal "Servitudes" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785 799; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* 5 ed (2006) 324-325; AJ van der Walt *The law of servitudes* (2016) 170.

[192] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 210-297; MJ de Waal "Servitudes" in R Feenstra, R Zimmerman (eds) *Das römisch-holländische recht: Fortschritte des Zivilrechts im 17 Und 18 Jahrundert* 567 583;MJ de Waal "Servitudes" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785 799.

[193] PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* 5 ed (2006) 324; AJ van der Walt *The law of servitudes* (2016) 170.

[194] CG van der Merwe *Sakereg* 2 ed (1989) 472.

[195] CG van der Merwe *Sakereg* 2 ed (1989) 472; MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 231-232; MJ de Waal "Die passiwiteitsvereiste by grondserwitute en die skepping van positiewe serwituutverpligtinge" 1991 *Tydskrif vir die Suid-Afrikaanse Reg* 223 235; AJ van der Walt *The law of servitudes* (2016) 170.

[196] *D* 8 1 15 1. See MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 213-215; MJ de Waal "Die passiwiteitsvereiste by grondserwitute en die skepping van positiewe serwituutverpligtinge" 1991 *Tydskrif vir die Suid-Afrikaanse Reg* 233 234; AJ van der Walt *The law of servitudes* (2016) 171.

[197] MJ de Waal "Servitudes" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785 799.

positive obligation on the owner of the servient tenement in certain instances,[198] however the Roman account of the passivity principle was adopted by Roman-Dutch authors[199] and by the pandectists.[200] They ensured the survival of the principle in modern civil law. It was adopted in South African law in the form of a developed principle originating from pandectist jurisprudence.[201]

There is one exception to the principle of passivity that originates from Roman law. This exception holds that a dominant tenement owner may rest a structure on her land against or on a structure or wall located on the servient tenement. As a result, the dominant tenement owner may compel the servient tenement owner to maintain the structure on the servient tenement. The servient tenement owner is obliged to bear the burden inflicted upon her land by the dominant tenement to the degree that will make it possible for the owner of the servient tenement to do so.[202] This servitude is also known as the servitude of support (*servitus oneris ferendi*).[203] Voet interpreted another praedial servitude, namely the *servitus altius tollendi* as a positive duty that could also be imposed on the owner of the servient tenement.[204] In this regard, the servitude

[198] H Dernburg *Pandekten* vol I (1892) 561-562; KA von Vangerow *Lehrbuch der Pandekten* vol I 7 ed (1865) 691. Examples include the duty to pay rent, the delivery of products such as wood, the provision of services and in general maintenance duties etc. See examples of such burdens in §1018 of the German *Burgerliche Gezetzbuch*. See also MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 230.

[199] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 224-225; MJ de Waal "Die passiwiteitsvereiste by grondserwitute en die skepping van positiewe serwituutverpligtinge" 1991 *Tydskrif vir die Suid-Afrikaanse Reg* 233 234 (citing Huber *Hedendaegse rechts-geleertheyt* 2 43 4; Voet 8 2 7, 8 4 17, 8 6 4; Van Leeuwen *Censura forensis* 2 14 13; Van Leeuwen *Rooms-Hollands regt* 2 19 7, 2 20 1, 2 21 1); AJ van der Walt *The law of servitudes* (2016) 171.

[200] H Dernburg *Pandekten* vol I (1892) 560. See MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 231.

[201] H Dernburg *Pandekten* vol I (1892) 560. For a discussion of the pandectist jurisprudence, see MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 230-236; AJ van der Walt *The law of servitudes* (2016) 171.

[202] *D* 8 5 6 2. See also JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 550; CG van der Merwe *Sakereg* 2 ed (1989) 472; MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 215-218; MJ de Waal "Die passiwiteitsvereiste by grondserwitute en die skepping van positiewe serwituutverpligtinge" 1991 *Tydskrif vir die Suid-Afrikaanse Reg* 233 235-237; AJ van der Walt *The law of servitudes* (2016) 171.

[203] The following texts provide support for this exception: *D* 8 2 1 1, 8 2 33, 8 5 6 2 and 3 and 5-7, 8 5 7, 8 5 8. See MJ de Waal "Servitudes" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785 799.

[204] Voet 8 2 7; 8 4 17; MJ de Waal "Servitudes" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785 799. See PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* 5 ed (2006) 324 in which the authors agrees with Voet that there are two exceptions to the passivity rule, namely the servitude compelling the owner of the servient tenement to construct a building of a certain height (*servitus altius tollendi*) and the servitude which imposes a duty on the owner of the servient tenement to keep her wall in a good state of repair (*servitus oneris ferendi*). These authors do acknowledge that the validity of the exception mentioned by Voet is open to doubt.

would compel the owner of the servient tenement to raise a building on her land in order to protect the dominant tenement against the sun or cold winds. [205] De Waal suggests that Voet most probably interpreted the contents of this specific servitude incorrectly and there is also no evidence that Voet received support for his interpretation from other Roman-Dutch authors.[206] In another analogous looking servitude that allowed the dominant tenement owner to rest a beam on a wall or structure on the servient tenement (*servitus tigni immitendi*), a positive obligation compelling the servient tenement owner to maintain the structure on the servient tenement was not allowed.[207] The reason for this is that the burden imposed by the servitude on the neighbouring structure was of a limited extent.[208]

Whether the South African law of servitudes received the requirement of passivity revolves around two conflicting judgments.[209] In both *Schwedhelm v Hauman*[210] and *Van der Merwe v Wiese*[211] the legal question was whether the owner of a servient tenement could be obliged in terms of a servitude of drawing water to perform positive duties pertaining to the supply of water and the maintenance of the network of pipes.[212] In *Schwedhelm v Hauman* the traditional approach was upheld and the court found that the servitude holder's right to draw water from the dam on the defendant's land was a valid servitude.[213] However, the law prohibits the servitude holder the right to demand that the defendant – as the servient tenement owner – should perform any positive duties in relation to the servitude.[214]

In contrast to *Schwedhelm v Hauman*, the court in *Van der Merwe v Wiese* held that the *servitus in faciendo consistere nequit* principle is no more than a useful guide

[205] Voet 8 2 7; 8 4 17; MJ de Waal "Servitudes" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 799.
[206] MJ de Waal "Servitudes" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 799-800.
[207] AJ van der Walt *The law of servitudes* (2016) 171-172.
[208] AJ van der Walt *The law of servitudes* (2016) 172.
[209] MJ de Waal "Servitudes" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785 801-802; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* 5 ed (2006) 324-325.
[210] 1947 (1) SA 127 (E).
[211] 1948 (4) SA 8 (C).
[212] MJ de Waal "Servitudes" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785 802; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* 5 ed (2006) 324-325.
[213] 1947 (1) SA 127 (E) 136.
[214] 1947 (1) SA 127 (E) 136.

in the interpretation and application of servitudes.[215] The legal question in this case was whether the owner of a servient tenement could be obliged in terms of a servitude agreement to maintain a windmill on the servient tenement and to supply a specified volume of water to the dominant tenement.[216] Fagan J concluded that the *servitus in faciendo consistere nequit* principle did not prevent the creation of the positive servitudal duties in question.[217] Most modern South African authors criticise *Van der Merwe v Wiese*. Van der Merwe,[218] De Waal[219] and Sonnekus and Neels[220] reject the main arguments on which the court based its decision.[221] More specifically, Van der Merwe and De Waal state that the decision was based on inadequate historical authority and incorrect conclusions from historical sources.[222] Furthermore, they state that the argument based on comparative sources is inaccurate and unconvincing[223] and that its reliance on South African case law is equally unconvincing and not supported by adequate authority.[224] It is therefore argued that the decision is neither argued convincingly, nor supported by proper policy analysis.[225]

In South African academic literature it is commonly accepted in line with the legal position in Roman and Roman-Dutch law, that a servitude may not inflict a positive

[215] For a discussion of the case see MJ de Waal "Servitudes" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785 802; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* 5 ed (2006) 324-325.
[216] *Van der Merwe v Wiese* 1948 (4) SA 8 (C) 10-11; AJ van der Walt *The law of servitudes* (2016) 173-175.
[217] MJ de Waal "Servitudes" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785 802.
[218] CG van der Merwe *Sakereg* 2 ed (1989) 475-476; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* 5 ed (2006) 324-325; AJ van der Walt *The law of servitudes* (2016) 174-175.
[219] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 279-284; MJ de Waal "Die passiwiteitsvereiste by grondserwitute en die skepping van positiewe serwituutverpligtinge" 1991 *Tydskrif vir die Suid-Afrikaanse Reg* 239. See also AJ van der Walt *The law of servitudes* (2016) 174-175.
[220] JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 582-583; JL Neels "Ewigdurende oorsaak. Die *perpetua causa*-vereiste by erfdiensbaarhede: Uitoefening van 'n saaklike serwituut afhanklik van 'n positiewe dadigheid deur die eienaar of gebruiker van die dienende erf" 2009 *Tydskrif vir die Suid-Afrikaanse Reg* 672. See AJ van der Walt *The law of servitudes* (2016) 174-175.
[221] AJ van der Walt *The law of servitudes* (2016) 174.
[222] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 279-281; CG van der Merwe *Sakereg* 2 ed (1989) 475-476. See also AJ van der Walt *The law of servitudes* (2016) 174-175.
[223] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 281-282; CG van der Merwe *Sakereg* 2 ed (1989) 476. See AJ van der Walt *The law of servitudes* (2016) 174-175.
[224] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 282-283. See also AJ van der Walt *The law of servitudes* (2016) 174-175.
[225] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 283-284. See AJ van der Walt *The law of servitudes* (2016) 174-175.

obligation on the owner of the servient tenement to do something.[226] The established exception to the principle is the *servitus oneris ferendi*. The reason for this approach is identified in the nature of limited real rights.[227] As discussed in the previous chapter, the Deeds Registries Act requires that real rights in land as well as servitudes, which are limited real rights, are registered in the deeds registry.[228] During the time when *Van der Merwe v Wiese* was decided, the Deeds Registries Act was applicable and therefore section 63(1) of the Act should have been enforced. This provision states that real rights in land must be registered and section 63(1) furthermore stipulates that personal rights that do not have the effect of restricting the exercise of ownership in land may not be registered.[229] Based on these relevant provisions of the Act, the interpretation of the Deeds Registries Act appears to constitute a bar to the registration of positive servitudal duties because a positive obligation cannot result in a subtraction from the *dominium*.[230] Interestingly, section 63(1) was amended in 1973 by the addition of a proviso which reads as follows:[231]

> "a deed containing such a condition as aforesaid may be registered if, in the opinion of the registrar, such condition is complementary or otherwise ancillary to a registrable condition or right contained or conferred in such deed."

At first glance this provision appears to negate the requirement of passivity for praedial servitudes.[232] However, De Waal agrees with other academic authors that this could not have been the intention of the legislature.[233] This proviso is merely regarded as providing a practical solution to the type of problem encountered in cases such as *Schwedhelm v Hauman* and *Van der Merwe v Wiese*. Even though the Registrar of Deeds would be allowed to register a deed of servitude incorporating positive duties for the owner of the servient tenement, the mere act of registering the right would not

[226] CG van der Merwe *Sakereg* 2 ed (1989) 471-477; AJ van der Walt *The law of servitudes* (2016) 172.
[227] AJ van der Walt *The law of servitudes* (2016) 172.
[228] MJ de Waal "Servitudes" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785 802; AJ van der Walt *The law of servitudes* (2016) 175.
[229] MJ de Waal "Servitudes" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785 802-803; AJ van der Walt *The law of servitudes* (2016) 175-176.
[230] MJ de Waal "Servitudes" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785 803.
[231] Section 10 of the General Law Amendment Act 62 of 1973.
[232] MJ de Waal "Servitudes" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785 803.
[233] MJ de Waal "Servitudes" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785 803; H Delport & NJJ Olivier *Sakereg vonnisbundel* (1981) 8, 542, 544; MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 285; CG van der Merwe *Sakereg* 2 ed (1989) 477.

convert these conditions from personal into real rights.[234] It is only the individual who undertakes to perform these positive duties who will be contractually bound to do so.[235] The positive duties do not attain a servitudal character and will not be enforceable against all successive owners of the servient tenement.[236] Therefore, one can conclude that the proviso does not negate the maxim *servitus in faciendo consistere nequit* requirement.[237] Therefore, even though the requirement is based upon the fundamental distinction between personal and real rights, it is fitting to regard it as a requirement for the establishment of praedial servitudes.[238] This requirement specifies what may not constitute the content of a praedial servitude. Therefore, it can be said that it fulfils a similar function as the other requirements, namely that it safeguards against a proliferation of servitudes and servitudal obligations.[239]

An interesting question that has emerged is whether the *servitus in faciendo consistere nequit* requirement as currently applied in South African law is too strict in the sense that it prohibits legal development in servitudal law. Validity requirements should always be flexible enough to allow for the creation of new praedial servitudes when the needs of a developing modern society so requires.[240] Thus, the question is whether a need exists that will justify a flexible interpretation of the passivity requirement whereby more positive obligations can be imposed on the owner of the servient tenement. De Waal analysed German[241] and Dutch[242] law and discovered that a flexible interpretation of the passivity requirement will indeed meet the material

---

[234] MJ de Waal "Servitudes" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785 803.
[235] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 289; MJ de Waal "Servitudes" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785 803.
[236] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 289; MJ de Waal "Servitudes" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785 803.
[237] MJ de Waal "Servitudes" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785 803.
[238] MJ de Waal "Servitudes" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785 803.
[239] MJ de Waal "Servitudes" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785 803.
[240] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 14-15; MJ de Waal "Servitudes" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785 789. See chapter 3 part 3 3.
[241] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 236-249.
[242] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 250-256.

practical needs of society.[243] He argues that South African law also illustrates that the need does exist for the passivity requirement to be interpreted in a more flexible manner.[244] However, he cautions that adopting a flexible approach that places an obligation on the owner of the servient tenement would also have the effect of undermining the distinction between real and personal rights.[245] A flexible approach will be in direct contrast with the purpose that the passivity requirement intends to serve, namely to prohibit a proliferation of burdens on land and to prevent the erosion of ownership.[246] However, De Waal suggests that in light of the fact that the law cannot remain rigid and that it should be flexible enough to accommodate the needs of modern society, the passivity requirement ought to be made flexible in specific instances only.[247] De Waal suggests that a restricted possibility should be created in South African law that will allow parties to the servitudal contractual agreement (apart from the alternative that exists in terms of the *servitus oneris ferendi*) with the right to impose positive maintenance obligations on successive owners of the servient tenement when dealing with certain praedial servitudes.[248] De Waal proposes that South Africa should adopt the approach followed in German law where the relaxation of the passivity requirement is restricted to positive praedial servitudes that allows the owner of the dominant tenement to conduct certain activities on the servient tenement.[249]

---

[243] See full dissertation of MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 293 (especially chapter 6 discussing the passivity requirement) 210-293.

[244] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 257-293, 293.

[245] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 293

[246] MJ de Waal "Servitudes" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785 803.

[247] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 294.

[248] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 295-296, 298. See AJ van der Walt *The law of servitudes* (2016) 180; see also 169-180.

[249] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 236-249, 294. See AJ van der Walt *The law of servitudes* (2016) 181 footnote 482: According to German law, §1020 (2) of the Burgerliches Gezetsbuch, in principle a servitude may not impose a positive duty to act on the owner of the servient tenement. §1020 regulates circumstances where the dominant tenement owner uses a structure or building on the servient tenement to make the exercise of her servitudal rights possible. Example of such structures are a catchment dam, canal, sewage pipelines or staircases without which a servitude cannot be exercised. §1022 of the Burgerliches Gezetsbuch stipulates that in circumstances where the content of the praedial servitude is of such a nature that the building or construction on the servient tenement offers support for another building or construction, located on the dominant tenement, then it will be expected of the owner of the servient tenement to maintain the structure. This provision is similar in content to the *servitus oneris ferendi*. However, in German law the *servitus oneris ferendi* is not the only exception to the rule that a positive obligation cannot be imposed on the owner of the servient tenement. Any servitude that is similar to the content of the *servitus oneris ferendi* could have the effect of imposing a positive

Furthermore, it should also be restricted to positive praedial servitudes where the exercise of the servitude is dependent on a construction or plant situated on the servient tenement that would be more conveniently maintained by the owner of the servient tenement than by the owner of the dominant tenement. He also proposes that a requirement should exist that parties should explicitly negotiate and register the contractual agreement that imposes a positive obligation and that the obligation should be restricted to additional or ancillary obligations only.[250] In other words the obligation should not be the prime essence of the servitude. De Waal further suggests that a second proviso should be inserted into section 63(1) of the Deeds Registries Act, to give effect to the aforementioned propositions made by him. The proviso should state that when a praedial servitude is exercised by means of the usage of a plant or construction on the servient tenement, the servitude condition ought to be registered in terms of which the servient tenement owner has to maintain the plant or construction in accordance with the interests of the dominant tenement owner. This proposal made by De Waal could arguably be relevant with regard to a positive praedial trading servitude. The content of a positive praedial trading servitude entails that the owner of a dominant tenement may occupy a building on the servient tenement to conduct commercial activities. It would be reasonable to expect from the owner of the servient

obligation on the owner of the servient tenement. However, these positive obligations will only have the effect of a real right, if it is registered. §1020 of the Burgerliches Gezetsbuch only comes into play in limited circumstances, namely where the duty to provide a supporting structure to the building on the dominant tenement, is the primary core and essence of the servitude. §§1020 and 1022 does not deviate drastically from the principle that positive obligations may not be imposed on the owner of the servient tenement except in circumstances similar to the *servitus oneris ferendi*. However, §1021 of the Burgerliches Gezetsbuch is a drastic deviation of the general rule that a positive obligation cannot be imposed on the owner of the servient tenement. In terms of this provision, the parties to a servitude may agree that the owner of the servient tenement will maintain the structure or building on the servient tenement to the extent that the owner of the dominant tenement requires for the exercise of his or her servitudal rights. This exception will only be granted in limited circumstances. Furthermore, it is required that this contractual agreement should be registered to have the effect of a real right. If it is not registered, it wil only have the effect of a personal right. The servient tenement owner does not have to physically maintain the structure. It will be sufficient if he undertakes to cover the relevant costs involved. Furthermore, the application of §1021 is dependent on the distinction between primary and secondary duties. The positive obligation imposed on the owner of the servient tenement should not constitute the primary duty of the servitude. It should only constitute a secondary duty, if not it will not qualify as a praedial servitude in terms of §1021. A secondary duty to erect a building work on the servient land was recognised in German case law, provided that it is derived from the primary negative right to allow use of the servient tenement. Van der Walt relies on BGH 25 February 1959, V ZR 224/87 to substantiate the aforementioned statement. He also asserts that this case was not about positive duties. However, the BGH recognised positive duties in an *obiter* remark. The *obiter* remark was confirmed by BGH 3 February 1989, V ZR 224/87, NJW 1989, 1607 and it was applied in the case of OLG Bavaria, 17 January 1990, BReg 2 Z 122/89, DNotz 1991, 257. In addition, the German civil code authorises the creation of maintenance duties. See §§ 1020, 1021, 1022 of the German Civil Code.

[250] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 295-296, 298. See AJ van der Walt *The law of servitudes* (2016) 180, 169-180.

tenement to share certain maintenance duties with regard to the maintenance of the structure on her land that is used by the dominant tenement owner. Therefore, one could argue that the passivity requirement should have a more flexible interpretation to accommodate positive praedial trading servitudes in this regard.

In German law for example, security servitudes are used that consist of a combination of a limited real right in the form of a uniquely German security servitude (*Sicherheitsdienstbarkeit*) and a contract.[251] This servitude is applied when the goal is to force a landowner to buy products or services only from the servitude holder. The security servitude is used to burden the servient tenement on which the owner of the servient tenement operates a gasoline station. This servitude is created in favour of a supplier of oil products, to the effect that the owner of the servient tenement will not sell any other oil products on the servient tenement. The owner of the servient tenement and the beneficiary supplier will enter into a contractual agreement that allows the owner of the gasoline station to sell oil products bought from the supplier while at the same time obliging her to buy oil products from the supplier. Similar constructs are also used to secure the obligation to buy beer from a brewery or energy from an energy plant. This construct has been accepted in case law because the servitude remains unaffected by the accompanying contract.[252] However, it remains controversial in doctrine as it is regarded as a circumvention of the principle that servitudes cannot impose a duty to act on the servient tenement.[253]

### 3 2 3 Conclusion

This section will recapitulate the important and relevant aspects pertaining to the establishment of a praedial servitude in preparation for the application of these requirements to trading rights in chapters 4 and 5. Chapter 2 illustrated that the registration requirement for real rights in land as set out in the Deeds Registries Act together with the subtraction from *dominium* test as developed by case law serves as

[251] AJ van der Walt *The law of servitudes* (2016) 182. This servitudal construct will be discussed in chapter 4 that deals with positive praedial trading servitudes.
[252] This stance is accepted in German case law. See JF Baur & R Stürner Baur *Sachenrecht* 18 ed (2009) § 33 paras 18-19; Du Otto "Dienstbarkeiten" in H Grziwotz, A Keukenschrijver & G Ring (eds) *NomosKommentar* BGB *Sachenrecht* vol 3 §854-1296 3 ed (2013) 955-1181 971 (para 55); J Wilhelm *Sachenrecht* 4 ed (2010) paras 1986; 1989. See also AJ van der Walt *The law of servitudes* (2016) 182.
[253] J Wilhelm *Sachenrecht* 4 ed (2010) paras 1986-1989. See also AJ van der Walt *The law of servitudes* (2016) 182.

an anti-fragmentation device to prevent the erosion of ownership and to promote the absoluteness of a small number of clearly defined property rights.[254] Another important feature of servitudes has been discussed in this chapter, namely the establishment requirements for praedial servitudes, which also serve an anti-fragmentation purpose. These requirements regulate the creation and continued existence of praedial servitudes.[255] The following requirements are important in this regard: the existence of two tenements; compliance with the passivity principle; and the *utilitas* requirements.[256] The elements of *vicinitas* and *perpetua causa* are in essence covered by the *utilitas* principle and should arguably not be treated as separate and independent requirements.[257] Therefore, one could conclusively assert that only three establishment requirements are currently acknowledged in South African law.[258]

The essence of the requirements are as follows: Firstly, the requirement that two tenements should exist is a fundamental principle for the establishment of praedial servitudes as this characteristic clearly distinguishes a praedial servitude from a personal servitude.[259] Secondly, the *utilitas* requirement indicates what the content of a praedial servitude should be. For purposes of trading rights potentially creating praedial servitudes, the most significant (and perhaps challenging) requirement will be the *utilitas* requirement. Three possible interpretations exist for the *utilitas* requirement, namely an exceedingly narrow interpretation, a somewhat wider interpretation and an even wider interpretation.[260]

Even though the somewhat wider interpretation of the *utilitas* requirement was never expressly formulated by the courts, it appears that South African law seems to follow this approach as it was developed in ancient romanist and humanist

---

[254] See chapter 2. See also AJ van der Walt *The law of servitudes* (2016) 183.
[255] AJ van der Walt *The law of servitudes* (2016) 184.
[256] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 23–29.
[257] See summary and full dissertation of MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989); JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 584.
[258] See full dissertation of MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 298.
[259] See full dissertation of MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 298.
[260] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 101. The distinction between the three interpretations pertaining to South African law is first mentioned in CG van der Merwe "Die nutsvereiste by erfdiensbaarhede" in DJ Joubert (ed) *Petere Fontes: LC Steyn Gedenkbundel* (1980) 163 164-165. See further JL Neels *Onderskeidende kenmerke by diensbaarhede* (1989) 3; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 587-588; AJ van der Walt *The law of servitudes* (2016) 128.

jurisprudence.[261] In terms of this modern approach a clear and direct utility link should exist between the servient tenement and the dominant tenement, which does not only focus on the natural condition of the land or on the narrow agricultural use of the land but which also focuses on the business, industrial and economic destination of the dominant tenement.[262] In this regard the *utilitas* requirement accommodates the possibility that trading rights can be exercised in the form of a servitude as will be shown in chapters 4 and 5 where specific examples of trading rights are considered. An essential component of the *utilitas* requirement is that a servitude should serve the use of the dominant tenement and not merely the personal delight of a particular person. It has been noted that it is difficult to conceive how a right to trade on the servient tenement, or how the right to prevent another from trading on their own land, can actually benefit the dominant tenement and not the mere personal interests of the owner of the dominant tenement. When having to determine whether a specific condition in actual fact complies with the *utilitas* requirement, the economic, business or industrial destination given to the dominant tenement by its original owners (as a result of the development and appointment of the dominant tenement) will be taken into consideration.[263] To assist courts in drawing a conclusion as to whether a particular condition agreed to by parties has the effect of serving the land or the personal delight of the owner of the dominant tenement, a few guidelines have been proposed by academic scholars. The guidelines entail the fact the *utilitas* requirement will be regarded as complied with if the servitude serves the use of the land by all the potential subsequent owners of the dominant tenement.[264] The crux of the matter is that when

---

[261] See footnotes 176-179 above. *D* 8 1 8, 8 2 2, 8 2 3, 8 2 15, 8 5 8 1; F Schulz *Classical Roman law* (1951) 394; S Sutro *Leerboek der Instituten* (1878) 349; *D* 43 20 3; J Cujacius *Opera (ad Parisiesnem Fabrotianam Editionem)* (1839) (Tomus Septimus): commentary on *D* 8 1 8. JC van Oven *Leerboek van Romeinsch Privaatrecht* (1948)145. See also CG van der Merwe "Die nutsvereiste by erfdiensbaarhede" in DJ Joubert (ed) *Petere Fontes: LC Steyn Gedenkbundel* (1980) 163 172; MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 106-109.

[262] CG van der Merwe "Die nutsvereiste by erfdiensbaarhede" in DJ Joubert (ed) *Petere Fontes: LC Steyn Gedenkbundel* (1980) 163-176; CG van der Merwe *Sakereg* 2 ed (1989) 470-471; MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 298, 302-303; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 588; AJ van der Walt *The law of servitudes* (2016) 133.

[263] AJ van der Walt *The law of servitudes* (2016) 140.

[264] CG Hall *CG Hall & EA Kellaway Servitudes* 3 ed (1973) 2; CG van der Merwe "Die nutsvereiste by erfdiensbaarhede' in DJ Joubert (ed) *Petere fontes: LC Steyn gedenkbundel* (1980) 163 175; HJ Erasmus, CG van der Merwe & AH van Wyk *RW Lee & AM Honoré: Family, things and succession* 2 ed (1983) para 372; HJ Delport & NJJ Olivier *Sakereg vonnisbundel* 2 ed (1985) 548; CG van der Merwe *Sakereg* 2 ed (1989) 470-471; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 589; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* 5 ed (2006) 323. See MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD

a praedial servitude is established, it must have the effect of meeting the needs of the dominant tenement and all the successive owners of the dominant land.[265] It should not be aimed at accommodating the transient, incidental or temporary needs of a specific dominant tenement owner.[266] An example of a dominant tenement developed and appointed for a specific purpose includes specific infrastructure or structures such as a theatre, brewery or oil refinery. The establishment of a trading praedial servitude will be justified if the servitude intends to support or benefit economic uses of the dominant tenement.[267] The infrastructure on the dominant tenement should characterise the property with regard to a specific use and the property should in actual fact be used for that purpose.[268]

Furthermore*, perpetua causa* and *vicinitas* are notable features to determine the utility of the servient tenement to the dominant tenement.[269] The distance between the dominant and servient tenement will always be examined with regard to the question whether a specific servitude could be of benefit to the dominant tenement in the particular circumstances. From case law and academic literature it is clear that in the case of an urban servitude the two tenements do not have to share a common border. The two tenements may be separated by intervening properties that are not burdened with a servitude. Conversely, in the case of a rural servitude, where the two tenements do not share a common border due to an intervening parcel of land, the legal requirement is that the intervening properties should be subject to a servitude (even though the servitude on the intervening properties does not have to be the same as the servitude registered on the servient tenement). The reason for this is that the

dissertation Stellenbosch University (1989) 169. See also AJ van der Walt *The law of servitudes* (2016) 132.

[265] CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2ed (2010) para 548.

[266] CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2 ed (2010) para 548. L Arndts & R Von Arnesberg *Lehrbuch der pandekten* (1886) 343; H Dernburg *Pandekten* vol I (1892) 574; CF Glück *Pandecten* vol x (1808) 37; KA von Vangerow *Lehrbuch der Pandekten* vol I 7 ed (1865) 710; O Wendt *Lehrbuch der Pandekten* (1888) 381; B Windscheid *Lehrbuch des Pandektenrechts* (1900) 945. See MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 79-80; MJ de Waal "Servitudes" in R Feenstra, R Zimmerman (eds) *Das römisch-holländische recht: Fortschritte des Zivilrechts im 17 Und 18 Jahrundert* (1992) 568 578.

[267] AJ van der Walt *The law of servitudes* (2016) 140.

[268] AJ van der Walt *The law of servitudes* (2016) 140.

[269] *Venter v Minister of Railways* 1949 (2) SA 178 (E) 185, *Hotel De Aar v Jonordon Investment (Edms) Bpk* 1972 (2) SA 400 (A) 405, *Bisschop v Stafford* 1974 (3) SA 1 (A) 12; *Lorentz v Melle and Others* 1978 (3) SA 1044 (T) 1049; CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2 ed (2010) para 548.

servient tenement should be linked with the dominant tenement.[270] In view of the function of the *utilitas* requirement, the benefit that the servitude ought to provide should also be relatively durable and should not be literally interpreted that it should exist in perpetuity.[271] When considering the condition to be registered, the prospect that the characteristic of the servient tenement that makes the servitude useful might terminate in the future does not infer that the servitude will not be regarded as durable and therefore no longer useful.[272] If at the time when the servitude is created the characteristic appears relatively durable and useful, the *utilitas* requirement would be regarded as having been met even though the probability exists that the state of affairs could change in the future.[273]

Furthermore, the passivity requirement indicates the content that may not be included within a servitude, namely that positive obligations may not be imposed on the servient tenement except in certain circumstances, namely the *servitus oneris ferendi*. The reason for this is that the owner of the servient tenement can never be obliged to perform a positive duty in terms of the servitude because the rendering of a performance is a characteristic of a personal right and not a real right.[274] However, De Waal rightfully proposes that in the South African context, the passivity requirement should have a flexible interpretation in that the owner of the servient tenement should be obliged in specific circumstances to exercise maintenance duties on the servient tenement especially where the exercise of a positive servitude is dependent on a construction situated on the servient tenement. De Waal also adds that this positive obligation on the servient owner should not be the crux of the servitudal agreement. It should only be an ancillary obligation to the primary servitudal agreement. The suggestion that the passivity requirement should be interpreted in a flexible manner, is important especially within the context of positive praedial trading servitudes where the

[270] AFS Maasdorp *Maasdorp's Institutes of South African law vol 2: The law of things* 6 ed (1938) 202.
[271] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 95; MJ de Waal "*Perpetua causa* (permanente grondslag) as vestigingsvereiste vir grondserwitute" (1991) 54 *Tydskrif vir Heedendaagse Romeins-Hollandse Reg* 717 736-737; AJ van der Walt *The law of servitudes* (2016) 161,164.
[272] AJ van der Walt *The law of servitudes* (2016) 164-165.
[273] AJ van der Walt *The law of servitudes* (2016) 165.
[274] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 210-297; MJ de Waal "Servitudes" in R Feenstra, R Zimmerman (eds) *Das römisch-holländische recht: Fortschritte des Zivilrechts im 17 Und 18 Jahrundert* 567 583; MJ de Waal "Servitudes" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785 799; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* 5 ed (2006) 324; AJ van der Walt *The law of servitudes* (2016) 170.

owner of the dominant tenement occupies a building on the servient tenement to conduct commercial activities.

It also appears from the German legal construct of security servitudes that it is possible to circumvent the passivity requirement. Even though a security servitude has a purely negative nature, this legal construct also appears to be akin to both a positive and negative praedial trading servitude. It is positive in the sense that it allows the dominant tenement owner to exclusively sell her goods to the owner of the servient tenement in terms of a contractual agreement that accompanies the negative servitude. It is negative in that it prohibits the owner of the servient tenement from selling any other competitive products on the servient tenement. The reason for this construct being accepted in case law is because the negative servitude remains unaffected by the accompanying contractual agreement.

Now that it has been clearly illustrated what the establishment requirements for a praedial servitude entail, focus will be shifted to another category of servitudes, namely personal servitudes. If a specific trading right condition does not comply with one of the establishment requirements for a praedial servitude, such as the challenging *utilitas* requirement, then it is conceivable that a personal servitude may be established. The following section will discuss the nature and content of personal servitudes in more detail.

## 3 3 Personal servitudes

### 3 3 1 Introduction

A personal servitude is a limited real right to the movable or immovable property of someone else that grants entitlements of use and enjoyment over the property to the holder of the servitude in her personal capacity and not in her capacity as owner of the land.[275] Furthermore, it is not transferrable to the servitude holder's successors in title as it is inseparably attached to the holder of the right.[276] The definition of a personal

[275] CG van der Merwe *Sakereg* 2 ed (1989) 506; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 338; AJ van der Walt *The law of servitudes* (2016) 455-464; L Kiewitz *Relocation of a specified servitude of right of way* LLM thesis Stellenbosch University (2010) 11.

[276] CG van der Merwe "Servitudes and other real rights" in F du Bois (ed) *Wille's principles of South African law* 9 ed (2007) 591 604; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's*

servitude as well as the distinction between a personal right and a personal servitude was formulated in *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd*.[277] In this regard, it is important not to confuse a personal servitude and personal right. A personal servitude is a limited real right and not a personal right.[278] This distinction sometimes causes great confusion and even some courts seem to get it wrong.[279]

Van der Walt notes that the error of describing a personal servitude as a personal right was due to the meaning attached to the word personal.[280] In the phrase 'personal right' the word 'personal' refers to the particular individual against whom the right is enforceable.[281] In other words, a personal right will only be enforceable against a person by virtue of the personal obligation that the right creates. A real right in turn has the effect of burdening property and is therefore enforceable against all successive owners of the burdened property. The word 'personal' in the phrase 'personal servitude' refers to the particular individual who is entitled to the right; a personal servitude benefits the particular person it was created in favour of, and it cannot be transferred to anyone else. Moreover, a personal servitude differs from a praedial servitude in that a praedial servitude benefits all the successive owners of the dominant tenement regardless of their individual identities.

---

*The law of property* 5 ed (2006) 338; AJ van der Walt *The law of servitudes* (2016) 455-464; L Kiewitz *Relocation of a specified servitude of right of way* LLM thesis Stellenbosch University (2010) 11.

[277] 1913 AD 267 281. The court explained that a personal servitude is one in which '*res non servit rei*, but *res servit personae'*.

[278] AJ van der Walt *The law of servitudes* (2016) 456; *Felix en 'n Ander v Nortier NO en Andere* [1996] 3 All SA 143 (SE) 148 (citing *Willoughby's Consolidated Co Ltd v Copthall Stores* Ltd 1913 AD 267 280); *Lorentz v Melle and Others* 1978 (3) SA 1044 (T) 1049; *Barclays Western Bank Ltd v Comfy Hotels Ltd* 1980 (4) SA 174 (E) 178; *Van Rensburg and Another v Koekemoer and Others* 2011 (1) SA 118 (GSJ) 14, 15 and 17; *National Stadium South Africa (Pty) Ltd and Others v Firstrand Bank Ltd* 2011 (2) SA 157 (SCA) 31-32.

[279] See *Cowley v Hahn* 1987 (1) SA 440 (E). For criticism of the *Cowley* decision, see PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 339 footnote 150, AJ van der Walt "Saaklike regte en persoonlike serwitute" (1987) 50 *Tydskrif vir Heedendaagse Romeins-Hollandse Reg* 343-352; TJ Scott "*Cowley v Hahn* 1987 (1) SA 440 (EC)" (1987) 20 *De Jure* 181-185; AJ van der Walt *The law of servitudes* (2016) 96. Another South African court decision that misstated the law in this regard is *Kruger v Gunter* 1995 (1) SA 344 (N) 350, 351. See PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 339 footnote 150; P de W van der Spuy "*Kruger v Gunter* 1995 (1) SA 334 (N) – Aard van 'n persoonlike serwituut" (1995) 28 *De Jure* 458-463; AJ van der Walt *The law of servitudes* (2016) 96. See also *Denel (Pty) Ltd v Cape Explosive Works Ltd* 1999 (2) SA 419 (T) 435; See PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 339 footnote 150; PJ Badenhorst "Registrability of real rights in the deeds office" (2000) 63 *Tydskrif vir Heedendaagse Romeins-Hollandse Reg* 499 506-507; AJ van der Walt *The law of servitudes* (2016) 96.

[280] AJ van der Walt *The law of servitudes* (2016) 456-457.

[281] AJ van der Walt *The law of servitudes* (2016) 457.

The fact that a personal servitude is designed to benefit a specific individual in her personal capacity has important implications.[282] It implies that the duration of a personal servitude is limited in that it exists for the benefit of a particular individual and will terminate automatically when the beneficiary dies.[283] If the beneficiary is a juristic person the servitude will expire when the juristic person is dissolved or after a period of 100 years, whichever commences first.[284] Section 66 of the Deeds Registries Act states that no personal servitude contending to extend beyond the beneficiary's lifetime may be registered. Furthermore, it provides that a transfer or cession of such personal servitude shall not be registered to any person other than the owner of the land burdened by the servitude.[285] Due to the fact that personal servitudes attach inseparably to the beneficiary it is not transferable as it terminates upon the death of the beneficiary. Even though a personal servitude is not transferable, some entitlements that flow from a beneficiary's right of servitude (particularly in the context of a usufruct as explained below) resembles the fact that their own servitudal entitlements may be transferred to third parties.[286] A generally accepted characteristic of a servitude is that it is indivisible. This means that a registered servitude exists over the whole of the servient tenement and for the benefit of the whole of the dominant tenement, unless the servitude grant stipulates otherwise.[287] However, even though it is a contentious issue some personal servitudes may be divisible with regard to specified servitudes in land, which means that it may only be exercised over an identified part of the servient tenement. This does not create a new servient object because the servient tenement as a whole remains the object of the servitude even if it is specified.[288]

[282] AJ van der Walt *The law of servitudes* (2016) 458.
[283] Voet 7 4 1.
[284] Grotius *Inleidinge* 2 39 15; Voet 7 4 14; Van Leeuwen *Censura forensis* 1 2 15 22; CG van der Merwe *Sakereg* 2 ed (1989) 506); PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 339; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 615; CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2 ed (2010) para 599; AJ van der Walt *The law of servitudes* (2016) 458.
[285] AJ van der Walt *The law of servitudes* (2016) 458.
[286] AJ van der Walt *The law of servitudes* (2016) 458-459.
[287] AJ van der Walt *The law of servitudes* (2016) 460.
[288] AJ van der Walt *The law of servitudes* (2016) 460.

## 3 3 2 Types of personal servitudes

### *3 3 2 1 Introduction*

Modern South African law does not recognise any formal *numerus clausus* of personal servitudes nor does it prevent recognition of novel categories of personal servitudes.[289] Therefore, in principle, new forms (or types) of personal servitudes can be created provided that it complies with the general requirements for the creation and acquisition of a limited real right as well as with the requirements for registration when the personal servitude relates to land.[290] The traditional personal servitudes that are recognised in Roman law are the servitude of use (*usus*),[291] usufructuary (*usufructus*)[292] and habitation (*habitatio*).[293] The old Roman law servitudes of *usus* and *habitatio* play a much lesser role in modern society even though they do still currently exist and feature in case law.[294] *Usufructus*, on the other hand, still plays an important role in modern law.[295]

Modern South African law also recognises two additional groups of personal servitudes, namely irregular servitudes (*servitutes irregulares*) and novel personal

---

[289] AJ van der Walt *The law of servitudes* (2016) 460.

[290] Section 63(1) and 65 of the Deeds Registries Act 47 of 1937; Sections 1 and 2 of the Alienation of Land Act 68 of 1981 requires that rights that are to be registered as limited real rights in land should be transferred in writing; Section 3e(ii) and 6A of the Subdivision of Agricultural Land Act 70 of 1970 impose restrictions on the granting of rights over undivided portions of agricultural land. See AJ van der Walt *The law of servitudes* (2016) 457; AJ van der Walt "*Novel servitudes Liber Amicorum – Essays in honour of JC Sonnekus Sakereg*" 2017 *Tydskrif vir die Suid-Afrikaanse Reg* 408 414. In *Janse van Rensburg v Koekemoer* 2011 (1) SA 118 (GSJ) paras 15-17 (read with para 19), the court, with reference to *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1918 AD 1 16 and sections 1 and 2 of the Alienation of Land Act 68 of 1981, confirmed that a personal servitude is an interest in land and that it therefore constitutes a subtraction from the *dominium* in land. The court also confirmed that any agreement that grants a personal servitude with regard to land should be in writing and ought to be signed by both parties to the agreement to be valid. Furthermore, it should be registered to create the servitude which means that a servitude with regard to land cannot be created orally. AJ van der Walt *The law of servitudes* (2016) 457 footnote 8 points out that the *Janse van Rensburg* case should be compared with *Felix en 'n Ander v Nortier NO en Andere* 1994 (4) SA 498 (SE) 500 where the court held that for a servitude in land to be registrable, it must be intended that the servitude should burden the servient land and not merely the current owner personally. Therefore, a purchaser of the burdened land may be held liable to an unregistered agreement to establish a personal servitude, if there is compliance with the doctrine of notice: *Dhayanundh v Narain* 1983 (1) SA 565 (N).

[291] Grotius 2 44 4; Voet 7 8 1; Van Leeuwen *Rooms Hollands regt* 2 9 2, *Censura forensis* 1 2 15 11.

[292] D 7 1 1; I 24; Grotius 2 38 5; Voet 7 1 3; Van Leeuwen RHR 2 9 1, *Censura forensis* 1 2 15 3; Van der Keessel *Praelectiones* 2 38 5, 2 39 1; Vinnius *Institutionum* 2 4 footnote 1; Van der Linden *Koopmans Handboek* 1 11 5.

[293] Voet 7 8 6; *Arend v Estate Nakiba* 1927 CPD 8 10; AJ van der Walt *The law of servitudes* (2016) 460.

[294] AJ van der Walt *The law of servitudes* (2016) 461; CG van der Merwe *Sakereg* 2 ed (1989) 506; CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2 ed (2010) para 580.

[295] AJ van der Walt *The law of servitudes* (2016) 461. This will be discussed in more detail below.

servitudes.[296] *Servitutes irregulares* have the appearance and content of praedial servitudes, however they are established and acquired in the form of personal servitudes in that they are established for the benefit of a specific person and do not 'run with' ownership of a dominant tenement. Novel personal servitudes have been acknowledged in case law, or created in legislation, of a kind or with a content unknown to Roman-Dutch law. The nature, content and characteristics of these various types of servitudes will be discussed below. The aim of this section is to determine the category of personal servitudes which may be best suited for the creation of a right to trade on someone else's property and a right to prevent another from trading on their own property.

### *3 3 2 2 Usufruct*

A usufruct is a limited real right that entitles a person to use and enjoy another individual's property and to take the fruits of the property without impairing the substance of such property.[297] The beneficiary of this servitude is termed a

[296] AJ van der Walt *The law of servitudes* (2016) 461: CG van der Merwe *Sakereg* 2 ed (1989) 505 identifies a third category namely restrictive conditions which are imposed as part of the establishment of a new township which can either be praedial or personal in nature. A few restrictive conditions have been acknowledged as servitudes in case law by CG van der Merwe *Sakereg* 2 ed (1989) 507 footnote 359. AJ van der Walt points out that the best explanation that distinguishes the difference between servitudes and restrictive conditions is found in J van Wyk *Planning law* 2 ed (2012) 313-316. Firstly, restrictive conditions are recognised as planning law tools because it relates to town planning schemes and it plays a role in the planning of a particular neighbourhood. This is not essentially the purpose of servitudes, especially praedial servitudes, because praedial servitudes are limited to regulating the use of land with regard to two sets of erven. Secondly, in the case of restrictive conditions, an erf is simultaneously a dominant and a servient tenement whereas in servitudes there is usually one servient and one dominant tenement due to the fact that the existence of two parcels of land are required. Since restrictive conditions does not require a specific dominant and/or servient tenement, it cannot be classified typically as servitudes. Thirdly, restrictive conditions create similar mutual rights between all the owners in a township. Praedial servitudes in turn create different rights and duties for the respective owners of the servient and dominant tenement. Seeking to fit a restrictive condition creating reciprocal rights into the mould of a servitude, which generally does not allow for reciprocity is arguably an artificial construction. Fourthly, a requirement for the valid establishment of a servitude is that the servient tenement should be useful to the dominant tenement. Traditional servitudes require that the servient tenement must be useful and beneficial to the dominant tenement to increase the enjoyment and usefulness of the dominant tenement. Restrictive conditions, on the other hand stipulate the usefulness purpose in more specific terms, namely that it is aimed at retaining the specific character of the neighbourhood. This requirement has never been held to constitute the purpose of a traditional servitude. Fifthly, the origin of restrictive conditions is different from the origin of servitudes. Restrictive conditions are established in one way only, namely on the strength of particular legislative provisions regulating township establishment. Servitudes, in turn, originate in various ways, namely in terms of an agreement between individuals, in terms of a court order and in some instances in terms of legislation.

[297] *D* 7 1 1; Grotius *Inleidinge* 2 38 5; Voet 7 1 3; Van Leeuwen *Rooms-Hollands regt* 2 9 1; Van Leeuwen *Censura forensis* 1 2 15 3. CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2 ed (2010) para 581; AJ van der Walt *The law of servitudes* (2016)

usufructuary.[298] This form of personal servitude is usually used in instances where a testator desires to provide one person an income after her death (for example the spouse), but desires that the property should devolve upon another person (for example a child).[299] The object of a usufruct may be a movable or immovable, [300] corporeal or incorporeal.[301] However, things which are consumed by use may not be the object of a usufruct, although it may be the object of a *quasi*-usufruct.[302] This is due to the fact that in the case of a usufruct, the property should be returned to the owner *salva rei substantia* (in terms of which the substance of the thing should remain unimpaired)[303] at the end of the usufruct. Consumable goods such as money, wine and grain cannot be returned to the owner *salva rei substantia* and therefore it may not be the object of a usufruct.[304] In the case of a *quasi*-usufruct, the goal is similar to a usufruct, namely to ensure that the usufructuary receives an income from the property

464-474. See L Grobler *The salva rei substantia requirement in personal servitudes* LLD dissertation Stellenbosch University (2015) 45-59.

[298] CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2 ed (2010) para 581.

[299] CG van der Merwe *Sakereg* 2 ed (1989) 508; CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2 ed (2010) para 581; AJ van der Walt *The law of servitudes* (2016) 464-465. It is important to draw a distinction between a usufruct and a *fideicommissum*. These two institutions serve similar goals, but the legal construction is different in each situation. A *fiduciarius* becomes the owner of the property that is restricted to a *fideicommissum*. In turn a usufructuary only acquires a limited real right with regard to the property. The legal construction of a *fideicommissum* entails a compulsory succession of owners as the current owner is obliged to pass the property to the next. A usufruct on the other hand creates a limited real right in another's property for a specific period of time. It may become problematic at times to discern whether a will creates a "*fideicommissum*" or a usufruct. Voet 7 1 10 establishes that in such a situation it should be presumed that a *fideicommissum* was constructed. However, ***Brunsdon's Estate v Brunsdon's Estate*** 1920 CPD 159 170-171 shows that Voet's view should not be followed too strictly especially if circumstances indicate that the testator intended for a legal construct in the form of a usufruct, effect should be given to that intention. See CG an der Merwe *Sakereg* 2 ed (1989) 508; CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds*) The law of South Africa* vol 24 2 ed (2010) para 582; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 616; AJ van der Walt *The law of servitudes* (2016) 465-466.

[300] CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2 ed (2010) para 583 footnote 1. The property should be intrinsically capable of being returned in a good condition, with the exception of fair wear and tear. Furthermore, the property must not be of a nature that changes in substance or which is extinguished or readily consumed. See E Leos "*Quasi*-usufruct and shares: Some possible approaches" (2006) 123 *South African Law Journal* 126 132-133.

[301] CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2 ed (2010) para 583 footnote 3 it is adequate if the object is only capable of affording aesthetic pleasure: *D* 7 1 41 pr, 7 1 41 1; Voet 7 1 14; *Gibaud v Bagshaw* 1918 CPD 202.

[302] CG van der Merwe *Sakereg* 2 ed (1989) 509; CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2 ed (2010) para 583; AJ van der Walt *The law of servitudes* (2016) 473.

[303] *D 7* 1 1. See also Grotius *Inleidinge* 2 38 5; Voet 7 1 3; Van Leeuwen *Rooms-Hollands regt* 2 9 1, *Censura forensis* 1 2 15 3; Van der Keessel *Praelectiones* 2 38 5, 2 39 1; Vinnius *Institutionum* 2 4; Van der Linden *Koopmans Handboek* 1 11 5; CG van der Merwe *Sakereg* 2 ed (1989) 508. For a detailed discussion of the *salva rei substantia* requirement, see specifically L Grobler *The salva rei substantia requirement in personal servitudes* LLD dissertation Stellenbosch University (2015) 54-57, 60-87.

[304] CG van der Merwe *Sakereg* 2 ed (1989) 509; AJ van der Walt *The law of servitudes* (2016) 473.

for life.[305] The *quasi*-usufructuary is entitled to use the property and to take all the income resultant from it for herself. The *salva rei substantia* requirement is replaced in the case of a *quasi*-usufruct.[306] When the *quasi*-usufruct expires, instead of having to comply with the *salva rei substantia* requirement, the *quasi*-usufructuary is obliged to give security that an equivalent will be restored to the owner.[307]

A usufructuary is entitled to the possession, administration, use and enjoyment of the specified property and its fruits which may be both natural and civil.[308] Furthermore, the beneficiary enjoys the use of the property including the fruits or income that is generated from the property.[309] Examples of natural fruits of land are vegetables, crops and plantations which have been planted for the purpose of being felled[310] as well as the natural fruits of animals such as milk, manure and wool.[311] The principle obligation of a usufructuary is that she should use the property in a reasonable manner and that she should return the object to the owner at the end of the usufruct with its essence or substance intact.[312]

It appears that no specific requirement exists that will in principle stand in the way of recognising trading rights as a usufruct. However, the personal servitude category of *ususfructus* arguably does not accommodate the content of a right to trade on another individual's property. This is because the content of a *ususfructus* is not synonymous with the content of a right to trade on another individual's property. The content of a *ususfructus* is quite narrow and specific and possibly limits the recognition of trading rights in this context. The content of a *ususfructus* is that it entitles a person to use and enjoy another individual's property and to take the fruits of the property

[305] AJ van der Walt *The law of servitudes* (2016) 473.
[306] AJ van der Walt *The law of servitudes* (2016) 473.
[307] *Geldenhuys v Commissioner for Inland Revenue* 1947 (3) SA 256 (C) 261-262; *Cooper v Boyes NO* 1994 (4) SA 521 (C) 531-533; CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2 ed (2010) para 584.
[308] CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2 ed (2010) para 585; *De Smidt v Burton Master of the Supreme Court* (1841) 1 M 222; *Barnett v Rudman* 1934 AD 203; Grotius *Inleidinge* 2 39 7, 8; Voet 7 1 28, 30.
[309] AJ van der Walt *The law of servitudes* (2016) 464-465.
[310] CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2 ed (2010) para 586; Voet 7 1 22; Van Leeuwen *Censura forensis* 1 2 15 9; Van der Keessel *Praelectiones* 2 39 7; *Houghton Estate Co vs FS McHattie & WS Barrat* (1894) 1 OR 92 103.
[311] CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The Law of South Africa* vol 24 2 ed (2010) para 586; P Krüger *Institutiones iustiniani* (1920) 2 1 37; Voet 7 1 26; *Morkel v Malan* 1933 CPD 370 374.
[312] AJ van der Walt *The law of servitudes* (2016) 475. See more specifically L Grobler *The salva rei substantia requirement in personal servitudes* LLD dissertation Stellenbosch University (2015) 54-57, 60-87.

whereas the content of a right to trade on another individual's land simply entails using or occupying a building on the servient tenement to serve as an outlet for commercial goods sold. Similarly, a servitude of *ususfructus* is most probably incompatible with the content of a negative personal servitude in restraint of trade because the content of such a servitude entails the incorporeal right to prohibit an individual to engage in competitive commercial activities. From the examples that will be discussed in chapters 4 and 5, it therefore seems unlikely that trading rights will take the form of a personal servitude of usufruct although there are no formal establishment requirements which would stand in the way.

### *3 3 2 3 Usus*

*Usus* is similar, although narrower, than a usufruct[313] as it allows an individual to use another individual's property.[314] The beneficiary of this servitude is termed a usuary.[315] Use rights can relate to the use of land, the use of a house as well as the use of animals.[316] If land is involved, the creation of a servitude of use is subject to the same registration requirements as all real rights in land.[317] It is also subject to the same restrictions pertaining to a usufruct, namely that it may not extend beyond the lifetime of the individual in whose favour it is created.[318] Nor may such a personal servitude of use be transferred or ceded to another individual other than the owner of the land burdened by the servitude.[319] To register a personal servitude of use relating to agricultural land, written consent should be obtained from the Minister responsible for agriculture.[320]

---

[313] For a personal servitude to be established, the grantor must be the owner of the servitude object at the time the servitude is granted: *Coetzee v Malan* 1979 (1) SA 377 (O) 380; AJ van der Walt *The law of servitudes* (2016) 488; CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2 ed (2010) para 600.

[314] CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2 ed (2010) para 600.

[315] CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2 ed (2010) para 600.

[316] CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2 ed (2010) paras 601-603.

[317] Sections 63 and 65 of the Deeds Registries Act 47 of 1937 read with the Alienation of Land Act 68 of 1981. See AJ van der Walt *The law of servitudes* (2016) 489.

[318] Section 66 of the Deeds Registries Act 47 of 1937. See AJ van der Walt *The law of servitudes* (2016) 489.

[319] Section 66 of the Deeds Registries Act 47 of 1937. See also AJ van der Walt *The law of servitudes* (2016) 489.

[320] Section 6A(1)(b) of the Subdivision of Agricultural Land Act 70 of 1970.

The usuary of land may take the fruit, vegetables and any of the produce of the land for her own daily needs and the needs of her household.[321] The rest of the produce belongs to the owner and the owner is entitled to enter the land in order to gather the produce.[322] A usuary of a house may occupy it with her family, servants and guests. In this regard, the usuary is also allowed to let out part of the house provided that she herself remains in occupation of the main part of the house.[323] With regard to animals, a usuary may use the animals for the purpose for which the animals have been employed.[324] An example would be to milk cows for the usuary's household's daily supply of milk and she may use the droppings.[325] The usuary is not allowed to alienate the property of which she has the use right, nor may she transfer the use of the property to a third party.[326] The owner may only collect the surplus of the fruits or produce that is left over by the usuary after her and her household's daily needs have been met.[327]

Even though the usuary's rights are restricted, there are indications that the principles relating to *usus* have been applied in a flexible manner in Roman and Roman-Dutch law.[328] The personal servitude category of *usus* appears to be a category that closely resembles the right to trade on another individual's property and may be a possibility if one considers the examples of trading rights that are ordinarily created.[329] In South African law, it appears that the usuary also now has the right to

---

[321] *D* 7 8 12, 7 8 12 1; Grotius *Inleidinge* 2 44 6; Van der Keessel *Praelectiones* 2 44 6.
[322] *D* 7 8 12, 7 8 12 1; Grotius *Inleidinge* 2 44 6; Van der Keessel *Praelectiones* 2 44 6.
[323] P Krüger *Institutiones iustiniani* (1920) 2 5 2; *D* 8 2 1, 8 2 8 pr; CG van der Merwe *Sakereg* 2 ed (1989) 522; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 341; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 641; CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2 ed (2010) para 602; CG Hall *CG Hall & EA Kellaway Servitudes* 3 ed (1973) 177.
[324] CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2 ed (2010) para 603.
[325] P Krüger *Institutiones iustiniani* (1920) 2 5 4; *D* 7 8 12 2; Grotius *Inleidinge* 2 44 4; *Dreyer v Ireland* (1874) 4 Buch 193 202 (use of water); Voet 7 8 2 (use of firewood); *Oosthuizen v Plessis* (1887) 5 SC 69 (use of a portion of land as pasturage); *Johannesburg Municipality v Transvaal Cold Storage Ltd* 1904 TS 722 729 (use of site for commercial purposes). Use may also be granted with regard to movables such as the use of farming implements.
[326] P Krüger *Institutiones iustiniani* (1920) 2 5 3; *Dreyer v Ireland* (1874) 4 Buch 193 202; *Louw v Van der Post* (1894) 11 CLJ 151 (O). See also CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2 ed (2010) para 604.
[327] AJ van der Walt *The law of servitudes* (2016) 491.
[328] CG van der Merwe *Sakereg* 2 ed (1989) 522; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 641 discusses *Fourie v Marandellas Town Council* 1972 (2) SA 698 (R); *Nel v Potgieter* 1962 (2) SA 608 (T) 610-611; AJ van der Walt *The law of servitudes* (2016) 491.
[329] CG van der Merwe *Sakereg* 2 ed (1989) 523; *South African Railways and Harbours v Paarl Rollller Flour Mills Ltd* 1921 CPD 62. See AJ van der Walt *The law of servitudes* (2016) 491-492. It is important to note that CG Hall *CG Hall & EA Kellaway Servitudes* 3 ed (1973) 176 (*usus*), 182 discusses trading rights as a separate category of personal servitudes and not under the heading of *usus*. Chapter 4 part 4 3 will elaborate more extensively why a right to trade on another individual's land may constitute a traditional personal servitude of *usus*.

use the land for specified commercial purposes that have the effect of bringing in profit or commercial gain for the usuary.[330] In *Johannesburg Municipality v Transvaal Cold Storage Ltd*,[331] land had been expropriated by the Government for railway purposes. The defendant demanded that it was entitled to the land in freehold and demanded compensation for the expropriation of the land. The defendant company was formed under Government patronage and with the assistance of a loan provided by the Government.[332] The defendant applied to the Government for the parcel of land in question for the erection of cold storage chambers. The court had to determine the extent of the interest that was acquired by the company in terms of the agreement.[333] The court held that the right intended to be granted should be classed as some form of personal servitude. The court also mentioned that the right could perhaps be placed under any of the categories of personal servitudes. Bristowe J even went so far as to assert that the right may most accurately be called a restricted form of *usus*.[334] The judge mentioned that it is not necessary to express a definite opinion of this because if it is a servitude, it is a limited real right, and therefore an interest in land for which the defendant is entitled to be compensated.

Thus, it appears (as with a usufruct) that there are no formal establishment requirements that will stand in the way of recognising a positive trading right as a personal servitude of *usus*. In terms of the nature of the servitude of *usus*, it may be possible for positive trading rights to be categorised as a personal servitude of *usus*. A negative servitude in restraint of trade, in turn is arguably incompatible with the content of a servitudal category of *usus* because the content of such a servitude does not relate to the right to occupy or use the servient tenement. Therefore, *usus* will not be the appropriate category to frame this type of servitude. It is most likely that such a negative personal servitude in restraint of trade will constitute a complete novel category of servitudes.

[330] *Johannesburg Municipality v Transvaal Cold Storage Ltd* 1904 TS 722 729.
[331] 1904 TS 722 729.
[332] *Johannesburg Municipality v Transvaal Cold Storage Ltd* 1904 TS 722 727.
[333] *Johannesburg Municipality v Transvaal Cold Storage Ltd* 1904 TS 722 728.
[334] *Johannesburg Municipality v Transvaal Cold Storage Ltd* 1904 TS 722 729.

*3 3 2 4 Habitatio*

The right of habitation (*habitatio*) provides the holder thereof with the entitlement to live in a building and the holder also has a right to sublet the building.[335] The beneficiary of the right is responsible for maintaining the substance of the property and keeping it intact.[336] With all other personal servitudes, the right of habitation is limited to the lifetime of the servitude holder.[337] It is also subject to the acquisition requirements that are set out in the Alienation of Land Act[338] and the Deeds Registries Act.[339] If the right of habitation relates to agricultural land, written consent to register the servitude should be obtained from the Minister responsible for agriculture.[340] The right of habitation is distinguishable from a servitude of usufruct and a servitude of use because the beneficiary of a right of habitation only has the right to occupy the particular residential structure that is subject to the right and may not use the surrounding land to cultivate crops or to graze animals.[341] Furthermore, the occupier may not gather and use fruits or crops from the land for personal use.[342]

However, in *Kidson v Jimspeed Enterprises CC*[343] the court held that the right of habitation related to the property generally. The court ordered that the beneficiary of a servitude of habitation was allowed to use the property for his own sustenance and that he was entitled to use the yard for purposes of a small vegetable and fruit garden for personal use.[344] Many academics have criticised this decision as it does not reflect

[335] P Krüger *Institutiones iustiniani* (1920) 2 5 5; Grotius *Inleidinge* 2 44 8; Voet 7 8 6; Van der Keessel *Praelectiones* 2 44 8; CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2 ed (2010) para 605.
[336] CG van der Merwe *Sakereg* 2 ed (1989) 523-524; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 341; HJ Delport & NJJ Olivier *Sakereg vonnisbundel* 2 ed (1985) 589; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 641; MM Corbett "Usufruct, *usus* and *habitatio*" in HR Hahlo (ed), MM Corbett, HR Hahlo, G Hofmeyr & E Kahn *The law of succession in South Africa* (1980) 378-401 400; CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2 ed (2010) para 605; CG Hall *CG Hall & EA Kellaway Servitudes* 3 ed (1973) 178; AJ van der Walt *The law of servitudes* (2016) 492.
[337] AJ van der Walt *The law of servitudes* (2016) 492. See JC Sonnekus "Verryking van die eienaar by nie-uitoefening van *habitatio* en versorgingsverpligtinge jeens eie ouer as bewoningsreghebbende" (2010) 5 *Stellenbosch Law Review* 26-44.
[338] 68 of 1981.
[339] *Janse van Rensburg v Koekemoer* 2011 (1) SA 118 (GSJ) paras 15-17 (read with para 19). See AJ van der Walt *The law of servitudes* (2016) 493.
[340] Section 6A(1)(b) of the Subdivision of Agricultural Land Act 70 of 1970. See AJ van der Walt *The law of servitudes* (2016) 308.
[341] AJ van der Walt *The law of servitudes* (2016) 494.
[342] CG van der Merwe *Sakereg* 2 ed (1989) 524; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 341; AJ van der Walt *The law of servitudes* (2016) 494.
[343] 2009 (5) SA 246 (GNP) para 15 (citing *D* 7 8 12 1) and 245.
[344] See AJ van der Walt *The law of servitudes* (2016) 494.

the legal position in Roman-Dutch law or modern South African law in a correct manner.[345] The Roman-Dutch law position holds that the servitude of habitation is restricted to the residential occupation of a dwelling and the servitude excludes the use of surrounding land for cultivation, grazing or harvesting of fruits or crops. The court incorrectly relied on a text of the Digest that referred to *usus* and not habitation and therefore arguably came to an incorrect conclusion.[346] Therefore, *Kidson* does not serve as authority that the content of a servitude of *habitatio* relates to property in general as this servitude is restricted to the occupation of a residential dwelling.

Yet again, no formal impediments exist that will stand in the way of recognising trading rights as a personal servitude of *habitatio*. However, the purpose of this servitude makes it unlikely for trading rights to be categorised as a personal servitude of *habitatio*. Even if the argument of the *Kidson* case is accepted, namely that a servitude of habitation relates to the land and not just the building subject to the life-right, *Kidson* still does not assist in fitting trading rights into this category. This is because the content of a servitude of *habitatio* entails providing the beneficiary holder with the entitlement to live in a building purely for residential purposes and not for commercial purposes which is essentially why one would establish trading servitudes in the first place. Therefore, the purpose of this category of servitudes is arguably incompatible with the object and content of a positive or negative servitude. Consequently, trading agreements (whether positive or negative) can probably not be fitted under this category of servitudes.

### *3 3 2 5 Servitutes irregulares*

*Servitutes irregulares* are servitudes that are praedial in their content but they are established as personal servitudes due to the fact that they benefit a specific individual

[345] CG van der Merwe "Extinction of personal servitude of habitation – *Kidson v Jimspeed Enterprises CC*" (2010) 73 *Tydskrif vir Heedendaagse Romeins-Hollandse Reg* 657-665 664, 665 (citing *Galant v Mahonga* 1922 EDL 69-80); J Scott "Effect of the destruction of a dwelling on the personal servitude of habitation – *Kidson v Jimspeed Enterprises CC*" (2011) 74 *Tydskrif vir Heedendaagse Romeins-Hollandse Reg* 155-169 166. See AJ van der Walt *The law of servitudes* (2016) 494-495.

[346] CG van der Merwe "Extinction of personal servitude of habitation – *Kidson v Jimspeed Enterprises CC*" (2010) 73 *Tydskrif vir Heedendaagse Romeins-Hollandse Reg* 657-665 664, 665 (citing *Galant v Mahonga* 1922 EDL 69 80); J Scott "Effect of the destruction of a dwelling on the personal servitude of habitation – *Kidson v Jimspeed Enterprises CC*" (2011) 74 *Tydskrif vir Heedendaagse Romeins Hollandse-Reg* 155-169 166. See AJ van der Walt *The law of servitudes* (2016) 494-495.

in her personal capacity without any reference to a dominant tenement.[347] The reason why servitudes are usually established in this manner is due to the fact that the beneficiary does not own land that could be considered as the dominant tenement. Irregular servitudes are personal servitudes in every sense of the word as they serve an individual in her personal capacity and the servitude is attached to the beneficiary and terminates when she dies (which in the case of juristic persons, is when the beneficiary is dissolved or after 100 years).[348] In addition, these servitudes are not transferable and must be exercised in a manner to enable the beneficiary to return the substance of the property (the land) to the owner *salva rei substantia* when the servitude terminates.[349] These servitudes resemble praedial servitudes (like a right of way, grazing, and water servitudes)[350] in their content in that they will always pertain to land. Therefore, irregular servitudes must be created like any other servitude in land, namely by means of registration with all the implications and requirements.[351] It should be emphasised that although the content of irregular servitudes is praedial in nature, it is a personal servitude as it does not serve a dominant land but the individual in her personal capacity.[352]

Van der Merwe lists a number of examples from case law that classify as *servitutes irregulares*.[353] One of the examples from case law listed by him is the right

[347] AJ van der Walt *The law of servitudes* (2016) 497-498; CG van der Merwe *Sakereg* 2 ed (1989) 507; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 341.
[348] AJ van der Walt *The law of servitudes* (2016) 498.
[349] AJ van der Walt *The law of servitudes* (2016) 498.
[350] AJ van der Walt *The law of servitudes* (2016) 497.
[351] Sections 63, 65-69 of the Deeds Registries Act 47 of 1937.
[352] Van der Walt highlights one specific problem relating to irregular servitudes, namely instances where the beneficiary is a juristic person such as a local authority or public body that uses the servitude during the course of its public duties. As a result of the fact that these bodies do not own land that could be considered as a dominant tenement, they acquire the necessary rights in the form of personal servitudes. The problem with this is that personal servitudes are not transferable and that it terminates after a period of 100 years when the beneficiary is a juristic person. Section 66 of the Deeds Registries Act 47 of 1937 does not allow the registration of these personal servitudes if they purport to extend beyond the 100 year period of the juristic person for whom it was created. Furthermore, it may not be transferred to any person other than the owner burdened by the personal servitude. See AJ van der Walt *The law of servitudes* (2016) 498-499.
[353] CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2 ed (2010) para 580 cites the following case law recognising the right to trade on another individual's property as a personal servitude (*servitutes irregulares*) that will be discussed extensively in chapter 4 3: *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1913 AD 267 281; *Potgieter and Another v Minty and Sons and Additional Magistrate Barberton* 1929 TPD 745 753; *Mergold Beleggings (Edms) Bpk v Bhamjee en 'n Ander* 1983 (1) SA 663 (T); *Bhamjee en 'n Ander v Mergold Beleggings (Edms) Bpk* 1983 (4) SA 555 (T); J Scott "*Bhamjee v Mergold Beleggings (Edms) Bpk* 1983 (4) SA 555 (T) Persoonlike serwituut – aard van – oordraagbaarheid" (1984) 47 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 351.

to trade on another individual's land. Therefore, it is conceivable that a right to trade on another individual's land could possibly constitute a *servitutes irregulares* as the content of such a servitude entails the rights to the goodwill of trading establishments and rights to trade granted in respect of specified properties. If the beneficiary does not own any land that could serve as a dominant tenement, and she is granted the right to trade on another individual's land, it seems conceivable that this type of right could be categorised as a *servitutes irregulares* due to the fact that it complies with the definition and nature of such a servitude. However, Van der Walt asserts that the examples from the case law listed by Van der Merwe relate to unusual or novel categories of personal servitudes rather than irregular servitudes.[354] Both authors are arguably correct in respect of their views. No formal establishment requirement exists that will prevent the recognition of trading rights as a *servitutes irregulares*. Therefore, in principle positive trading rights could be categorised as *servitutes irregulares* as suggested by Van der Merwe. Van der Walt is also correct in his view by regarding the right to either conduct or to prohibit commercial business on the servient land as a complete novel category of servitudes.[355] This is arguably correct especially with regard to a negative personal servitude in restraint of trade. Negative personal servitudes in restraint of trade, cannot fit the description of a *servitutes irregulares* because inherently a *servitutes irregulares* does not resemble a *negative* servitude but instead resembles established categories of *positive* praedial servitudes, such as a right of way, a right to graze cattle and a right to draw water from the servient tenement etc. Therefore, a negative servitude prohibiting a commercial business on the servient tenement would most likely classify as a complete novel category of servitudes. Arguably, it should not matter which category of personal servitude best suits positive and negative trading rights because both allow suitable alternatives. Therefore, depending on how the agreement is structured, both these categories should provide mechanisms to structure these types of rights.

## 3 4 Conclusion

The purpose of this chapter is to provide a platform for the analysis that will occur in chapters 4 and 5. Chapter 4 and chapter 5 will address the issues pertaining to the

[354] AJ van der Walt *The law of servitudes* (2016) 498 footnote 164.
[355] AJ van der Walt *The law of servitudes* (2016) 502.

nature (praedial or personal) and content (positive or negative) of trading servitudes more extensively. Chapter 4 will deal with the positive trading servitudes and chapter 5 with the negative trading servitudes. The purpose of these chapters will be to establish the nature and content of different trading servitudes and to examine (in cognizance of the statutory and doctrinal framework as discussed in chapters 2 and 3) under which conditions they would be registrable.

Having discussed the prerequisites for the establishment of praedial servitudes, the question that manifests is whether these requirements pose barriers to the recognition of trading servitudes.[356] De Waal examined the effectiveness of these requirements within the context of the function that these requirements aim to serve. These requirements aim to regulate the establishment of praedial servitudes by means of restricting the content of a servitude within certain boundaries. Similarly to the *numerus clausus* principle and the statutory framework discussed in chapter 2, the Roman-Dutch principles for the establishment of requirements for praedial servitudes, aims to counteract fragmentation[357] and therefore serves as an anti-fragmentation device to prohibit the proliferation of new real burdens on land.[358] It does this by prohibiting the recognition of certain rights as real burdens on land, without enumerating the rights that are already recognised in the closed list of limited real rights.[359] These requirements imply that only rights that qualify as limited real rights in land are recognised in the form of a servitude.[360] It also ensures that rights are created and used in a way that will not give effect to an unrestricted proliferation of overlapping land burdens or the erosion of the residual right of the owner of the servient tenement.[361] Therefore, the ensuing question is to determine to what extent these strategies (statutory framework and Roman-Dutch principles) constrain the creation of possible novel servitudes by consensus, such as trading rights. Additionally, the

[356] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 299.
[357] AJ van der Walt "*Novel servitudes Liber Amicorum – Essays in honour of JC Sonnekus Sakereg*" 2017 *Tydskrif vir die Suid-Afrikaanse Reg* 408 410.
[358] CG van der Merwe *Sakereg* 2 ed (1989) 468; MJ de Waal "Servitudes" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785 789; JL Neels "Erfdiensbaarhede: Nut vir heersende erf" 1988 *Tydskrif vir die Suid-Afrikaanse Reg* 527; AJ van der Walt "*Novel servitudes Liber Amicorum – Essays in honour of JC Sonnekus Sakereg*" 2017 *Tydskrif vir die Suid-Afrikaanse Reg* 408 410.
[359] AJ van der Walt "*Novel servitudes Liber Amicorum – Essays in honour of JC Sonnekus Sakereg*" 2017 *Tydskrif vir die Suid-Afrikaanse Reg* 408 410.
[360] AJ van der Walt "*Novel servitudes Liber Amicorum – Essays in honour of JC Sonnekus Sakereg*" 2017 *Tydskrif vir die Suid-Afrikaanse Reg* 408 411.
[361] AJ van der Walt "*Novel servitudes Liber Amicorum – Essays in honour of JC Sonnekus Sakereg*" 2017 *Tydskrif vir die Suid-Afrikaanse Reg* 408 411.

question that needs to be addressed is whether trading rights as a potential novel category of servitudes could pose a challenge to the anti-fragmentation strategies. This chapter showed that the key problem with the recognition of trading servitudes as praedial servitudes is whether they comply with the *utilitas* requirement. The question that should always be determined is whether trading servitudes can serve the land and not merely the interests of a specific person. Case law indicates that the *utilitas* requirement is satisfied and that a praedial servitude is possible if the use of the dominant land complies with certain development-and-appointment requirements. A utility link should exist between the servient and dominant tenement which does not only focus on the natural condition of the dominant tenement but also on the business, industrial and economic destination of the dominant tenement. If the *utilitas* requirement is complied with, it should arguably not be a problem for a trading right to be categorised as a praedial servitude. Chapters 4 and 5 will analyse the circumstances and conditions under which trading rights could be regarded as being in compliance with the *utilitas* requirement.

With regard to personal servitudes, it is important to note that modern South African law does not recognise any formal *numerus clausus* of personal servitudes.[362] As a result, it is clear that new types of personal servitudes in the form of trading servitudes could possibly be created. However, it can only be created if it complies with the general requirements for the creation and acquisition of a limited real right as well as with the requirements for registration, especially when the personal servitude concerns land.[363] The chapter also revealed that no formal requirements stand in the

[362] AJ van der Walt *The law of servitudes* (2016) 460.

[363] Section 63(1) and 65 of the Deeds Registries Act 47 of 1937; Sections 1 and 2 of the Alienation of Land Act 68 of 1981 requires that rights that are to be registered as limited real rights in land should be transferred in writing; Section 3e(ii) and 6A of the Subdivision of Agricultural Land Act 70 of 1970 impose restrictions on the granting of rights over undivided portions of agricultural land. See AJ van der Walt *The law of servitudes* (2016) 457 and AJ van der Walt "*Novel servitudes Liber Amicorum – Essays in honour of JC Sonnekus Sakereg*" 2017 *Tydskrif vir die Suid-Afrikaanse Reg* 408 414. In *Janse van Rensburg v Koekemoer* 2011 (1) SA 118 (GSJ) paras 15-17 (read with para 19), the court, with reference to *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1918 AD 1 16 and sections 1, 2 of the Alienation of Land Act 68 of 1981, confirmed that a personal servitude is an interest in land and that it therefore constitutes a subtraction from the *dominium* in land. The court also confirmed that any agreement that grants a personal servitude with regard to land should be in writing and ought to be signed by both parties to the agreement to be valid. Furthermore, it should be registered to create the servitude which means that a servitude with regard to land cannot be created orally. AJ van der Walt *The law of servitudes* (2016) 457 footnote 8 points out that the *Janse van Rensburg* case should be compared with *Felix en 'n Ander v Nortier NO en Andere* 1994 (4) SA 498 (SE) 500 where the court held that for a servitude in land to be registrable, it must be intended that the servitude should burden the servient land and not merely the current owner personally. Therefore, a purchaser of the burdened land may be held liable to an unregistered agreement to establish a personal servitude, if there is compliance with the doctrine of notice: *Dhayanundh v Narain* 1983 (1) SA 565 (N).

way of recognising trading rights as personal servitudes. However, the nature of certain categories of personal servitudes make them less suitable for trading rights. However, the nature of certain categories of personal servitudes make them less suitable for trading rights.

After listing and discussing the content of the different types of personal servitudes it appears that the positive right to conduct business on the servient tenement could possibly be established as a servitude of *usus*.[364] The reason for categorising a right to trade on another individual's land as a possible servitude of *usus* is because the object of a servitude of *usus* is that it allows the beneficiary with the right to *use* another individual's property.[365] To trade on another individual's land, the prospective servitude holder would need to use and occupy a building on the servient tenement, to conduct her trade. Therefore, she would have to use another individual's property, which seems similar in content to a servitude of *usus*. It is also conceivable for a right to conduct commercial business on the servient tenement to be categorised as a *servitutes irregulares* as suggested by Van der Merwe or a complete novel category of personal servitude as proposed by Van der Walt. There is no formal barrier to the recognition in this regard on each type of category of personal servitudes (*usus*, *servitutes irregulares* or novel) insofar as it pertains to positive trading rights. Practical examples of positive personal servitudes of trade will be discussed comprehensively in the subsequent chapter (chapter 4) to illustrate how these servitudes could possibly fit under the category of *usus*. At this point in time it is noteworthy to take cognizance of the fact that new types of personal servitudes in the form of trading servitudes could possibly be created, provided that it complies with the general requirements for the creation and acquisition of a limited real right as well as with the requirements for registration. It is doubtful that a negative, personal servitude in restraint of trade could be categorised under the traditional categories of personal servitudes because the content of a servitude of usufruct, use, habitation and an irregular servitude is generally incompatible with the content of a negative servitude in restraint of trade. Therefore, a negative servitude in restraint of trade would most likely fall under a complete novel

[364] CG van der Merwe *Sakereg* 2 ed (1989) 523; *Johannesburg Municipality v Transvaal Cold Storage Ltd* 1904 TS 722 729; *South African Railways and Harbours v Paarl Rolller Flour Mills Ltd* 1921 CPD 62. See AJ van der Walt *The law of servitudes* (2016) 491-492.
[365] CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2 ed (2010) para 600.

category of personal servitudes. The possible content and nature of negative personal servitudes in restraint of trade will be discussed extensively in chapter 5.

# Chapter 4: The right to engage in commercial activity on the servient land

## 4 1 Introduction

Now that it has been established that novel servitudes can in principle be created, provided that they comply with the statutory[1] and the doctrinal framework encapsulating the subtraction from the *dominium* test as developed in case law and the common law establishment requirements for praedial and personal servitudes, the next step is to determine the nature and content of each of the two main categories of trading servitudes, namely positive and negative trading servitudes (each of which could be either a praedial or a personal servitude). This chapter will focus on the category of positive trading servitudes and will set out the nature and content of a positive trading servitude.

A positive praedial servitude allows the dominant land owner to use the servient land in a certain way. The nature and content of a positive trading servitude, if authorised in our law, will most probably entail the following:[2] The owner of a dominant tenement will be authorised to establish a business and conduct trade on the servient tenement or she will be entitled to use the servient tenement as a commercial outlet for the products produced on the dominant tenement. The nature and content of positive trading servitudes will be discussed in relation to the fundamental legal principles as set out in chapters 2 and 3. This chapter will determine when and how the legal principles as discussed in chapters 2 and 3 are relevant to the recognition of trading rights as positive praedial and/or personal servitudes. In addition, this chapter will investigate whether the common law establishment requirements that are relevant to the creation of a praedial servitude pose a barrier, and whether the statutory framework and common law establishment requirements might constrain the creation of positive trading rights as a possible novel category of servitudes; and if so, to what extent. The chapter will also focus on the nature and content of a positive trading right as a possible personal trading servitude.

---

[1] Deeds Registries Act 47 of 1937.

[2] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 181.

The chapter will analyse existing case law where positive trading agreements were allegedly created in South African law. In the end, the hope is to arrive at some conclusion based on existing case law about whether positive trading rights could be given adequate protection in property law. This examination is done purely on the basis of whether South African courts dealing with positive trading rights have given adequate consideration to the establishment requirements for the creation of praedial and personal servitudes. The goal of that part of the chapter is to assess – on the basis of existing case law on point – whether positive trading rights are in fact better suited to fit the establishment requirements for personal servitudes.

## 4 2 Positive praedial trading servitude

### 4 2 1 Introduction

South African case law does not clearly recognise the right to conduct trade on another tenement in the form of a positive praedial trading servitude.[3] Chapter 4 part 4 2 2 will examine existing case law where positive trading rights were allegedly created and will highlight and identify the problematic questions pertaining to the possible creation of positive praedial trading servitudes. Chapter 4 part 4 2 3 will in turn attempt to address these problematic questions in the hope of illustrating what the nature and content of such a servitude (if it is at all possible) could potentially look like.

### 4 2 2 Case law demonstrating the nature of a right to trade on the servient tenement

In *Stuart v Grant*[4] the plaintiff sued as the widow and executrix testamentary of the late Marthinus Stuart for a declaration of rights of servitude of market square on premises that belonged to the defendant. The court did not specify what the content of a servitude of market square entails. However, it could possibly be interpreted as a servitudal right to trade on land that is developed and appointed as a market place, where individuals can sell goods for commercial purposes. Returning to the facts of the case, the plaintiff sought a perpetual interdict restraining the defendant from

[3] AJ van der Walt "*Novel servitudes Liber Amicorum – Essays in honour of JC Sonnekus Sakereg*" 2017 *Tydskrif vir die Suid-Afrikaanse Reg* 408 413.
[4] (1903) 24 NLR 416 419.

alienating any portion of land that was reserved and dedicated to the public as the market square of Stuartstown; restraining the defendant from obstructing the plaintiff and the public with the free and uninterrupted use of the market square and restraining the defendant from conducting any act contrary to the declaration and right claimed by the plaintiff.

The facts that gave rise to the dispute can be explained as follows: The defendant acquired part of the farm Lansdowne. She decided to develop a township that she intended to call Stuartstown on that land. Afterwards she bought an adjoining farm Ellerton with the plan to obtain additional land for the township. The sale of about 40 erven was advertised. Neither advertisement nor plan mentioned a servitude of market square.[5] Prior to the advertisement, an auction was held. It was at that sale that the plaintiff's late husband became the purchaser of one village lot which was afterwards duly transferred to him by deed of transfer. Stuart died and the land was still at that time registered in his name. The plaintiff then sued as her husband's widow and executrix testamentary on behalf of herself and all other holders of lots in the township and on behalf of the public. She claimed that a right of servitude of market square existed over the adjoining farm Ellerton that the defendant obtained as additional land. Furthermore, she claimed that this right of servitude was granted at the time of sale by the auctioneer as an agent of the defendant with her knowledge and approval. However, the defendant said that she refused to grant a servitude. At all times the defendant treated the disputed land as her absolute property.[6]

In this case the court stipulated that it is settled in terms of Roman-Dutch law that a servitude can only be created by registered title or prescription and that in this case no such registered title existed.[7] The court highlighted the fact that the plaintiff's late husband did not during the time of the auction or thereafter make any attempts to secure his supposed right of servitude by registration, nor did he raise any objection at any time during his lifetime to the transfer of the land unaccompanied by any right of servitude.[8] It seems that he accepted the transfer of the land without any such right of servitude.

[5] (1903) 24 NLR 416 420.
[6] (1903) 24 NLR 416 422.
[7] (1903) 24 NLR 416 426-427.
[8] (1903) 24 NLR 416 427.

The plaintiff based her claim on a verbal agreement concluded during an auction pertaining to the subdivision of land between her late husband and the auctioneer. The court held that the evidence provided was insufficient to confirm the plaintiff's right to a servitude of market square.[9]

> "The plaintiff's claim is thus mainly based upon verbal representations said to have been made by the auctioneer at the sale a quarter of a century ago, and which we are now asked to construe as a contract for the creation of a servitude *in perpetuo* on the defendant's land in dispute."[10]

In principle, it seems as though a court would be willing to recognise a servitude of market square, as a positive praedial servitude without questioning the validity requirements for the establishment of such a servitude. It might be that the court did not consider the validity requirements for the establishment of a praedial servitude due to the fact that the alleged servitudal right was not registered and the evidence provided by the plaintiff was insufficient to prove the existence of a praedial servitude. Nonetheless, given the court's insinuation in this regard, it is necessary to question whether the validity requirements could have been met if the court had done the investigation and therefore whether a positive servitude could indeed be created in this regard.

De Waal asserts that if the court had in mind that a personal servitude could be registered in the *Stuart* case, there would not have been any problem.[11] However, this is not what the court had in mind if the aforementioned quoted statement of Finnemore J is taken into consideration. Finnemore J assumed that a positive praedial trading servitude would be possible without determining whether such a servitude can in fact be created in these contexts. Furthermore, it is not clear what the content of such a proposed servitude would entail and what the entitlements would be of the owner of the dominant tenement if such a servitude is created.[12] In this regard, it would probably entail that the servitude holder would have had a permanent outlet on the servient tenement to sell his products.

---

[9] See also MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 180-181.
[10] *Stuart v Grant* (1903) 24 NLR 416 425.
[11] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 180-181.
[12] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 180.

The question that needs to be addressed with regard to *Stuart v Grant*,[13] is whether the validity requirements could have been met if the court had done the proper investigation. The most problematic common law criteria that come into play are the two tenement and *utilitas* requirements.[14] Regarding utility, the question is whether the right to trade on the market square would serve the dominant tenement because a praedial servitude can only be established if the servient tenement provides a benefit to the dominant tenement. The court did not formulate and phrase these questions at all. It could be that the court did not consider and realise the importance of the questions or the court just assumed that the answers to these questions would be affirmed.[15] If the latter is the case, then this raises a deep concern. The basis on which a praedial servitude of the right to trade on another tenement will be regarded as a praedial servitude has not emerged from this decision although the facts in the case clearly lend themselves to an enquiry of this nature.[16] As alluded to in chapter 3,[17] the biggest problem with recognition of trading rights as praedial servitudes is the question of whether it complies with the *utilitas* requirement. This is because it is difficult to envisage how a right to trade on someone else's property can benefit the dominant tenement as opposed to simply meeting the needs of a specific person in her personal capacity. If the *utilitas* requirement is not complied with, it may be impossible to create a praedial servitude, but it could still be possible to establish a novel category of personal servitude as will be shown in the latter part of the chapter.[18]

The right to conduct commercial activity on the land of another was also questioned in *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd*.[19] In *Willoughby's* it was originally decided that the right to trade on the servient land had been acquired in the form of a personal servitude.[20] Subsequently, the court held that

[13] (1903) 24 NLR 416 419.
[14] Chapter 3 part 3 2 2 5; MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 181. The other requirements as mentioned in chapter 3 would presumably be unproblematic.
[15] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 181.
[16] MJ de Waal "Servitudes" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785 796.
[17] See chapter 3 part 3 2 2 5.
[18] See chapter 3 above. See also AJ van der Walt *The law of servitudes* (2016) 502-503.
[19] 1913 AD 267; 1918 AD 1.
[20] *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1913 AD 267. The *Willoughby's* case 1913 AD 267; 1918 AD 1 (the Appellate Division (1913 AD 267 282-283) initially decided that a right to trade on the servient tenement had been acquired in the form of a personal servitude. However (1918 AD 1 19) held that a servitude had never been created.

a servitude had never been created.[21] This case serves as authority for clearly acknowledging a positive personal trading servitude, which entails the right to trade on the servient tenement in favour of the beneficiary in his personal capacity.[22] However, this case is discussed under the heading of positive praedial servitudes because it appears from specific assertions made by the court that it would have been willing to consider the creation of a positive praedial trading servitude in this particular case.[23]

The facts of this case are as follows: In 1895, the Matabele Gold Reefs and Estates Company sold "the goodwill of the trading and stores business established by the Estates Company in Matabeleland, together with the right to trade on land, belonging to the Estates Company" to a company known as Dawson's Stores.[24] In 1900, Dawson's Stores transferred all its assets to the defendants. In 1911 the plaintiff purchased from the Estates Company all the assets of that company and received a clean transfer of the farms forming part of the assets sold to them. The plaintiff sought a declaratory order confirming that the defendant was not entitled to the exclusive right of establishing trading sites or trading on the farms, nor did the defendants have the right to occupy any portion of the farms. The plaintiffs also sought an order for the defendant company to be ejected. The defendants pleaded that in 1900 they had acquired the sole, exclusive and perpetual right of establishing and leasing trading sites. In addition, they alleged that they had acquired the right of trading on the land and that the plaintiff had notice of the defendant's claims when the land was purchased. As a result, the defendants refused to give up possession of the trading sites.

Innes J held that to establish its position, the defendant must prove the following: that the rights acquired by Dawson's Stores were rights to a servitude; and that Copthall Stores is entitled to the benefit of such servitude.[25] Therefore, it was necessary to establish whether the words of the clause amounted to an agreement to constitute a personal servitude in favour of Dawson's Stores.[26] Innes J concluded that Dawson's Stores obtained a personal servitude and that from the very nature of a

[21] *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1918 AD 1.
[22] *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1913 AD 267 280-282; *Ex parte Steinberg* 1940 CPD 1 5-6.
[23] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 183.
[24] *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1913 AD 267; 1918 AD 1 2. In this case, the matter was heard by the Appellate Division. The Appellate Division referred the matter to the Privy Council. The Privy Council then referred the matter back to the Appellate Division.
[25] *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1913 AD 267 280.
[26] *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1913 AD 267 281.

personal servitude, the right which it confers is inseparably attached to the beneficiary and not any dominant tenement. As a result, Dawson's Stores could not transfer it to its heirs (Copthall Stores), nor could Dawson's Stores alienate it. Therefore, when Dawson's Stores sold their rights, the right to trade perished with those rights.[27]

The decision serves as authority for acknowledging a positive personal trading servitude to trade on the servient tenement in favour of the beneficiary in his personal capacity.[28] Case law therefore seems to support recognition and registration of a positive personal trading servitude (that allows the beneficiary to conduct business on the servient land) relatively clearly. It is interesting to consider whether the court in the *Willoughby's* case would have been willing to recognise the right to conduct commercial activities on another's land as a praedial servitude, even though the question of whether a praedial servitude was created, or could have been created, never came into question in this case. According to the facts in the *Willoughby's* case, Copthall Stores was not the owner of a dominant tenement that could have possibly been served by a servient tenement (the land on which commercial activities may be conducted).[29] De Waal notes that Innes J made general statements in the *Willoughby's* 1913 judgment which indicates that the court may have acknowledged a positive trading right in the form of a praedial servitude.[30]

Innes J asserted that there are many instances where South African courts have acknowledged and clearly recognised traditionally established personal servitudes in the form of praedial servitudes, provided that the servitudal right had been attached to

---

[27] *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1913 AD 267 282-283. In the subsequent decision it was stated that a servitude had never been created. De Waal argues that the court might have been willing to entertain a praedial servitude if the right to trade had been established in favour of a dominant tenement. It appears from the Appellate Division that the court accepted *obiter* that a right to trade on a specific land would constitute a praedial servitude. See *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1918 AD 1 16: "A servitude to trade upon particular property, whether constituted in favour of another property indefinitely or [in favour] of another person for his lifetime, would carry with it the right to occupy a portion of the servient tenement reasonably sufficient for the purpose."

[28] *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1913 AD 267 280-282; *Ex parte Steinberg* 1940 CPD 1 5-6.

[29] *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1913 AD 267, 277, 281, 283. See *Letsitele Stores (Pty) Ltd v Roets and Others* 1958 (2) SA 224 (T) 226 where Williamson J referred to the servitude in the *Willoughby's* case as a personal servitude. See MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 183. See also chapter 3 part 3 2 2 2 for a discussion of the requirement that two tenements belonging to different owners should exist for a praedial servitude to be established. Furthermore, see chapter 3 part 3 2 2 5 where the *utilitas* requirement is explained, which entails that a servient tenement should benefit the dominant tenement for a praedial servitude to be established.

[30] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 183.

the ownership of other land.[31] De Waal states that the context within which Innes J articulated this statement, creates the impression that he definitely regarded the right to trade on another parcel of land as a right that could possibly be construed as a praedial servitude, had it been attached to the ownership of another tenement.[32] These views of Innes J are taken further in the *Willoughby* 1918 judgment.[33] Innes J in the 1918 decision asserted that a servitude to trade on specific property, whether the servitude is established in favour of another property or an individual, would also entail the right to occupy a portion of the servient tenement.[34] The *Willoughby* judgment of 1918 also indicates that the decisive factor appears to be whether the intention of the parties involved was to create a personal or a praedial servitude, and not whether such a servitude could in fact be created according to the validity requirements of servitudes.[35] Other factors that might play a role in determining whether a praedial servitude could be established with regard to trading rights are not specifically mentioned by the court.[36]

However, it should also be mentioned that it appears that in the *Willoughby* 1913 judgment, Solomon J did not share the same sentiments as Innes J.[37] This is due to the fact that Solomon J explicitly stated that the right to trade constitutes a personal servitude over the land in favour of the grantee (servitude holder). This view of Solomon J is affirmed by the fact that he categorised the right to trade on someone else's land with a group of rights that at most can be only classified as a personal

[31] *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1913 AD 267 281-282. In this case, the judge refers to *Dreyer v Ireland* (1874) 4 Buch 193; *Oosthuizen v Plessis* 1887 5 SC 69 and *Louw v Van der Post* 1894 11 CLJ 151. See MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 183.

[32] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 183.

[33] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 183.

[34] *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1918 AD 1, 16. See also MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 183 footnote 484 who indicates that this is the correct inference that can be made from Innes's J statement. De Waal relies on the statement of Steyn J in *Hollman and Another v Estate Latre* 1970 (3) SA 638 (A) 644: "… in *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1918 AD 1, 16 it was apparently accepted that a servitude to trade upon a particular property could be constituted in favour of another property."

[35] *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1918 AD 1; MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 183; MJ de Waal "Servitudes" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785 796.

[36] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 184.

[37] *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1913 AD 267 286. See MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 184.

servitude.[38] Based on Solomon's J views, a personal servitude should theoretically be possible because the existence of a dominant tenement is not specifically a prerequisite for the establishment of a personal servitude. This is because the benefit of conducting trade on the servient tenement will accrue to the beneficiary in her personal capacity, making a personal servitude more suitable for the specific agreement that positive trading rights seek to achieve. Positive personal trading servitudes will be discussed in chapter 4 part 4 3. De Waal argues that Innes J might have been willing to acknowledge a praedial servitude if the right to trade had been established in favour of a dominant tenement,[39] however, the circumstances under which a servitude to trade on another's property will be regarded as a positive praedial trading servitude still remain uncertain.[40] This is in light of the fact that the court did not address the *utilitas* and two tenement requirements. In this regard, a servitude can only be of a praedial nature if the servient tenement increases the benefit of the dominant tenement on a durable basis for everyone who uses the dominant land in accordance with its natural or acquired condition.[41] Moreover, two tenements are specifically required for the creation of praedial servitudes, arguably making the servitudes established in *Stuart* and *Willoughby's* personal rather than praedial.

Even though existing case law is inconclusive regarding the circumstances under which a positive praedial trading servitude would be possible, the subsequent section will focus on possible circumstances under which a servitude to trade on another's property could in fact be regarded as a positive praedial trading servitude.

[38] *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1913 AD 267 286-287: Solomon J refers to the examples of personal servitudes provided by Voet 8 1 1. See J Voet 1647-1713 *Commentarius ad Pandectas* translated by Gane P *Commentary on the Pandect* (1955-1958), namely the right to pluck fruit, walk about or to dine on another individual's property. He says that he cannot see any reason why the right to trade should not fall within the same category. See MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 184.

[39] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 183.

[40] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 184.

[41] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 202-209, 298, 302-303; AJ van der Walt *The law of servitudes* (2016) 134. See chapter 3 part 3 2 2 5 for a discussion of the *utilitas* requirement.

## 4 2 3 Nature and content of a positive praedial trading servitude

### *4 2 3 1 Introduction*

From the above discussion of South African case law, it appears that courts might be willing to acknowledge positive praedial trading servitudes in the context of conducting commercial activities on another individual's property or using another individual's property as a commercial outlet. However, in both cases discussed above, the courts consistently failed to explain whether such an entitlement could be established in the form of a praedial servitude, given the specific establishment requirements for a praedial servitude as set out in chapters 2 and 3. Furthermore, the courts failed to determine what such a right would entail for the owner of the dominant tenement as the potential servitude holder.[42]

To be able to answer the question whether a right to conduct commercial activities on another's property can be constituted in the form of a praedial servitude, section 63(1) of the Deeds Registries Act[43] and the subtraction from the *dominium* test as developed in case law should be met. Furthermore, as stated in chapter 3 part 3 2, the requirement that two tenements belonging to different owners should exist, the *utilitas* requirement and the passivity requirement are relevant with regard to the question of whether new forms of praedial servitudes can be established. Needless to say, the elements of *vicinitas* and *perpetua causa* are also important to the establishment of a praedial servitude. However, it is important to remember, as explained in chapter 3, that these two requirements are in essence encompassed by the *utilitas* principle and therefore it is not necessary for them to be treated as separate and independent requirements.[44] With cognizance of chapters 2 and 3 of this dissertation, the subsequent section will illustrate the methodology that ought to be applied, to determine whether a positive praedial trading servitude can be established and what the content of such a servitude would entail.

---

[42] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 181.
[43] Act 47 of 1937.
[44] See chapters 3 parts 3 2 2 3, 3 2 2 4 and 3 2 2 5. See also the summary and full dissertation of MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 23-29; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 584.

*4 2 3 2 Methodology to determine whether a positive praedial trading servitude is possible*

This section will focus on what a court ought to do when having to determine whether a right to conduct commercial activities on another parcel of land constitutes a praedial servitude.[45] The first step is to determine whether the specific condition (the right to conduct any form of commercial activity on another individual's land) creates a real right to the extent that it diminishes an owner's *dominium* in a thing.[46] Section 63(1) of the Deed Registries Act provides the content to establish whether a right or condition with regard to land is real and therefore registrable. Furthermore, the following two criteria as developed by case law are also taken into consideration by the courts:[47] the intention of the parties creating a real right must be to bind not only the current owner of the land, but also his successors in title; and the right must be of such a nature that it results in a subtraction from the *dominium*[48] of the land against which it is to be registered.[49] If the parties who established the limitation had the intention of only binding the present landowner in his personal capacity, the right will not be acknowledged as a real right but only an agreement enforceable *inter partes*.[50] Therefore, the right will not be registrable either, even if it has the effect of resulting in a subtraction from the *dominium* of the land concerned.[51] A right to conduct trade on another individual's land by consent definitely has the effect of diminishing an owner's *dominium* in a thing as it provides the holder of the right with the entitlement to use the property; as well as with certain entitlements that are ordinarily inherent in ownership, or which have the effect of preventing the owner from exercising her right of ownership

[45] *Lorentz v Melle and Others* 1978 (3) SA 1048 (T) specified the general basic principles that should be taken into consideration when determining a question whether a right is capable of being a praedial servitude and whether this is what the parties had intended and indeed achieved. See also chapter 3 part 3 2.
[46] See chapter 2.
[47] CG van der Merwe *Sakereg* 2 ed (1989) 70-71; CG van der Merwe "Rights in land" in WA Joubert & JA Faris (eds) *The law of South Africa vol* 14 part 1 2 ed (2010) para 7. See specifically chapter 2 of dissertation.
[48] CG van der Merwe *Sakereg* 2 ed (1989) 70-83; *Ex parte Geldenhuys* 1926 OPD 155; *Lorentz v Melle and Others* 1978 (3) SA 1044 (T); *Pearly Beach Trust v Registrar of Deeds* 1990 (4) SA 614 (C) 615; *Cape Explosive Works Ltd and Another v Denel (Pty) Ltd and Others* 2001 (3) SA 569 (SCA); *Cowin v Kyalami Estate Homeowners Association* SGHC case no 12/11377, 25 February 2013; *Willow Waters Homeowners Association (Pty) Ltd v Koka NO and Others* 2015 (5) SA 304 (SCA).
[49] See chapter 2.
[50] *Fine Wool Products of SA Ltd & Another v Director of Valuations* 1950 (4) SA 490 EC 500-501, 513; *Coetzee v Malan* 1979 (1) SA 377 (O). See also chapter 2 2.
[51] CG van der Merwe *Sakereg* 2 ed (1989) 70-83.

to its full capacity.[52] Thus, if a right has such an effect, it will be regarded as being real and registrable.[53]

A praedial servitude is usually established by agreement in the form of a notarial deed between the owners of the two tenements. This is followed by registration against the title deed of the servient land even though it can also be registered against the title deed of the dominant tenement.[54] Additional to the registration requirement and the subtraction test, sections 65 to 76 of the Deeds Registries Act provide regulations pertaining to the creation and registration of personal and praedial servitudes and how the amendment, lapse and termination thereof should be reflected in the register.[55] Both praedial and personal servitudes might also be subject to further statutory requirements and limitations in addition to the Deeds Registries Act.[56]

Now that it has been established that a right to conduct commercial activities on another individual's land can be recognised as a limited real right in land that burdens the servient landowner and all her successors in title, the next question is what type of limited real right comes into existence (presumably a praedial or personal servitude). If a praedial servitude was created, it also has to comply with the requirements for the establishment of praedial servitudes.[57] If a personal servitude was created, it has to comply with the requirements and specific content for the establishment of a personal servitude.[58]

To be established as a praedial servitude, the following common law establishment requirements should be complied with in addition to the registration

---

[52] CG van der Merwe *Sakereg* 2 ed (1989) 70-83

[53] MJ de Waal "*Numerus clausus* and the development of new real rights in South African law" (revised version of a paper read at staff seminars at the University of Nijmegen on 21 June 1999 and Maastricht University on 22 June 1999).

[54] *Van Vuren and Others v Registrar of Deeds* 1907 TS 289, 295; CG Hall *CG Hall & EA Kellaway Servitudes* 3 ed (1973) 27; *Lorentz v Melle and Others* 1978 (3) SA 1048 (T). It is important to note that registration of a notarial deed does not render the specific right as having a servitudal character. It may happen that personal rights are accidentally registered. The mere fact that personal rights are registered does not convert them into a real right. See *Hollins v Registrar of Deeds* 1904 TS 603 607; *Lorentz v Melle and Others* 1978 (3) SA 1048 (T).

[55] AJ van der Walt "*Novel servitudes Liber Amicorum – Essays in honour of JC Sonnekus Sakereg*" 2017 *Tydskrif vir die Suid-Afrikaanse Reg* 408 410.

[56] 47 of 1937; the requirement that the servitudal agreement should be in writing in the Alienation of Land Act 68 of 1981 and restrictions pertaining to the creation of servitudes on agricultural land in the Subdivision of Agricultural Land Act 70 of 1970. See also AJ van der Walt "*Novel servitudes Liber Amicorum – Essays in honour of JC Sonnekus Sakereg*" 2017 *Tydskrif vir die Suid-Afrikaanse Reg* 408 410.

[57] See *Lorentz v Melle and Others* 1978 (3) SA 1044 (T). See also chapter 3 parts 3 3 and 3 4.

[58] See chapter 3 part 3 3.

requirements: there must be two tenements belonging to different owners; a praedial servitude must offer a relatively durable benefit to the owner of the dominant land and must not merely serve her personal pleasure; and a praedial servitude cannot impose a positive duty on the owner of the servient tenement.[59]

The biggest problem with recognition of trading servitudes as praedial servitudes is whether they comply with the *utilitas* requirement.[60] It has been established in chapter 3 part 3 2 2 5 that three possible interpretations exist for the *utilitas* requirement, namely an exceedingly narrow interpretation, a somewhat wider interpretation and an even wider interpretation.[61]

As concluded in chapter 3, South African law indirectly seems to follow the somewhat wider interpretation of the *utilitas* requirement as it was developed in romanist and humanist jurisprudence.[62] It is vital to establish that the dominant owner's right to trade on the servient land is *closely* related to the use and enjoyment of the dominant tenement (in other words, according to the dominant tenement's actual development, appointment and use for a specific purpose).[63]

The formal requirements as discussed are flexible enough to accommodate novel categories of servitudes such as positive praedial trading servitudes. The burdens that positive praedial trading servitudes could impose on the servient tenement are limited by restrictive interpretation of the grants.[64] As a result, it can confidently be asserted

[59] See chapter 3 part 3 2.
[60] See chapters 3 and 4 parts 3 4 and 4 3.
[61] CG van der Merwe "Die nutsvereiste by erfdiensbaarhede" in DJ Joubert (ed) *Petere Fontes: LC Steyn Gedenkbundel* (1980) 163; MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 101; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 587-588; MJ de Waal "Servitudes" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785 795; AJ van der Walt *The law of servitudes* (2016) 128.
[62] *D* 8 1 8, 8 2 2, 8 2 3 and 8 2 15, 8 5 8 1: Full citation T Mommsen & P Krüger *Digesta Iustiniani in Corpus iuris civilis* (1920), translation used: A Watson (ed) *The Digest of Justinian* (1985). F Schulz *Classical Roman law* (1951) 394; S Sutro *Leerboek der Instituten* (1878) 349; *D* 43 20 3; J Cujacius *Opera (ad Parisiesnem Fabrotianam Editionem) (Tomus Septimus*) (1839): commentary on *D* 8 1 8. JC van Oven *Leerboek van Romeinsch Privaatrecht* (1948) 145. See MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 106-109.
[63] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 207.
[64] AJ van der Walt "*Novel servitudes Liber Amicorum – Essays in honour of JC Sonnekus Sakereg*" 2017 *Tydskrif vir die Suid-Afrikaanse Reg* 408 415.

that these form of rights do not pose a significant threat of fragmentation or erosion of landownership if they are recognised.[65]

Interestingly, De Waal's proposition regarding the reformulation of the criteria concerning the *utilitas* requirement is substantiated by German law. Section 1019 of the German Civil Code states that a servitude may exist only in the form of a burden that offers a benefit for the use of the dominant tenement.[66] German law acknowledges a right to trade on another individual's land as a positive praedial trading servitude on the condition that a link should exist between the servitude and the use of the dominant land which is direct and beneficial (a so-called "Gewerbeausübung").[67] The right to operate a gas station or a restaurant are examples of positive praedial trading servitudes recognised in German law.[68] These examples from German law potentially show that a right to trade on another individual's property could possibly be constituted as a registrable praedial servitude, if there is strict compliance with the legal requirements as encapsulated in the methodology proposed above. The subsequent section will provide practical examples of the possible content of a positive praedial trading servitude to show that it should be possible to create such servitudes.

### *4 2 3 3 Practical examples of positive praedial trading servitudes*

If one takes into consideration the facts of *Stuart v Grant*[69] and if it is assumed that Mr Stuart did in fact have a dominant tenement situated relatively near to the market square (that could serve as the potential servient tenement), the question that has to be answered is what the content of a positive praedial trading servitude in that regard would entail. It would also need to be established whether the *utilitas* requirement could be complied with in this regard. The content of the servitude of market square may presumably entail distributing and selling goods produced on the dominant tenement at an outlet on the market square (servient tenement). If the dominant tenement is a

[65] AJ van der Walt "*Novel servitudes Liber Amicorum – Essays in honour of JC Sonnekus Sakereg*" 2017 *Tydskrif vir die Suid-Afrikaanse Reg* 408 415.
[66] https://www.gesetze-im-internet.de/englisch_bgb/ - accessed on 5 April 2017.
[67] I am extremely grateful and indebted to Dr Arne Schmieke and Andreas Humm for their invaluable assistance with regard to the obtaining of the most recent and relevant German law material. *Münchener Kommentar/Joost*, 6. Auflage (2013), § 1018 Rn 29; *Bamberger/Roth/Wegmann*, 41. Auflage (2016) § 1018 Rn 51; *von Bar Gemeineuropäisches Sachenrecht* Bd 1 München 2015 Rn 453.
[68] Münchener Kommentar/Joost, 6 Auflage (2013) § 1018 Rn 29.
[69] (1903) 24 NLR 416 419.

farm designed for agricultural purposes then it is possible to comprehend that a direct and beneficial link will exist between the dominant and servient tenement by means of using the market square as an outlet to sell the goods produced on the dominant tenement. However, if there is no direct link between the dominant tenement and the market square, no praedial servitude of market square can exist in the form of a praedial servitude. A personal servitude will be possible due to the fact that the servitude will benefit the beneficiary in her personal capacity.

In addition to a positive praedial trading servitude of market square as shown, another conceivable example, which illustrates how a positive praedial trading servitude can exist, is where an oil refinery is located on the dominant tenement and a petroleum station is established on the servient tenement. In such a case the owner of the dominant tenement may have a servitude registered against the servient land to sell petroleum and gasoline to the owner of the servient tenement on which the petroleum station is established. Similarly breweries may use a servitude to secure the right to deliver and sell their beverages on the servient tenement.[70] A practical example illustrating the brewery example is Newlands cricket and rugby grounds, which are situated within close proximity to The South African Breweries Limited. It should be possible for The South African Breweries Limited to register a positive praedial trading servitude against the servient tenement (which could be either the rugby or the cricket grounds). This servitude will entail The South African Breweries Limited supplying beverages to the kiosks at these sport grounds on match days.[71] The *utilitas* requirement will be met in these cases because a link exists between the servitude and the use of the dominant land which is direct and beneficial. Furthermore, the

[70] M Wolf "Marketability contra freedom of parties in the law of land burdens" in S van Erp & B Akkermans (eds) *Towards a unified system of land burdens?* vol 59 (2006) 11 16.

[71] This example is more or less similar to the German law example of security servitudes. See Chapter 3 part 3 2 2 6 and JF Baur & R Stürner Baur *Sachenrech*t 18 ed (2009) § 33 paras 18-19; Du Otto "Dienstbarkeiten" in H Grziwotz, A Keukenschrijver & G Ring (eds) *NomosKommentar BGB Sachenrecht* vol 3 §854-1296 3 ed (2013) 955-1181 971 (para 55); J Wilhelm *Sachenrecht* 4 ed (2010) paras 1986, 1989. See also AJ van der Walt *The law of servitudes* (2016) 182. It could be argued that an obligation placed on Newlands sports grounds to solely sell alcoholic beverages from The South African Breweries Limited, may be in contravention of the passivity requirement. This is because the passivity requirement entails that the content of a praedial servitude may never place any positive obligations on the owner of the servient tenement except in instances of servitudes of support (*servitus oneris ferendi*). It could possibly be argued that if a positive right to trade on the servient tenement is non-exclusive, then a right of a supplier to sell her goods to the owner of the servient tenement, will not contravene the passivity requirement as the servient owner will not be positively obliged to solely purchase from the product supplier located on the dominant tenement. However, if the owner of the dominant tenement would like to secure her rights to solely trade with the owner of the dominant tenement, the owner of the dominant tenement could negotiate for a negative praedial trading servitude to restrain competition or a negative personal trading servitude.

dominant tenement is located within close proximity to the servient tenement. Sonnekus mentions that a non-exclusive right to trade on the servient tenement could be established in certain instances for the benefit of the dominant tenement.[72] He mentions the example of a cobbler[73] trading on the dominant tenement. If there are shops located on the servient tenement, those shops could be compelled in terms of the servitude to take in the shoes for repair work on the servient tenement.

Furthermore, the right to exploit raw materials (soil components) on the servient tenement in terms of German law is also regarded as an example of a praedial servitude (a "Benutzungdienstbarkeit").[74] Regarding the right to exploit raw materials, the *utilitas* requirement is still applicable in German law to place certain restrictions on the recognition of certain rights as praedial servitudes.[75] As a point of departure it is accepted that raw materials cannot be mined by means of a praedial servitude for the sale thereof on the dominant tenement.[76] However, if there is a specific trade activity ("gewerblicher Betrieb") on the dominant tenement where these raw materials are processed, the establishment of a praedial servitude will be authorised in this regard.[77] An important qualification with regard to such a praedial servitude is that the dominant tenement must be developed and appointed for a particular trade activity. This requirement forms a material element for the existence of such a form of servitude. In other words, the dominant tenement must be designed in a special manner that enables it to be suitable for the particular trade activity.[78] If this requirement is complied

[72] JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 599.
[73] A cobbler is a person whose job is to mend shoes. K Kavanagh (ed) *South African concise Oxford dictionary* 10 ed (2009) 221.
[74] Münchener Kommentar/Joost, 6. Auflage (2013), § 1018 Rn. 29; MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 137. This form of a "benutzingdienstbarkeit" focuses on the right to trade on the dominant tenement and the right of the dominant tenement owner to mine solid compounds from the servient tenement. Even though the dominant tenement is used as a commercial trade outlet and not the servient tenement, the principle of utility still applies and remains the same as in the case of the right to trade on the servient tenement, namely that a specific trade activity must exist on the dominant tenement where the raw materials mined on the servient tenement are processed.
[75] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 138.
[76] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 138.
[77] Münchener Kommentar/Joost, 6. Auflage (2013), § 1019 Rn 5; MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 138.
[78] Münchener Kommentar/Joost, 6. Auflage (2013), § 1019 Rn 5; MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 138.

with, the processed products may be sold in favour of the owner of the dominant tenement.[79]

## 4 3 Positive personal trading servitude

### 4 3 1 Introduction

A personal servitude is a limited real right that imposes a burden on the servient tenement for the benefit of a particular person.[80] It is established in favour of the holder in her personal capacity and not in her capacity as owner of any land.[81] Furthermore, the benefit derived from a personal servitude attaches inseparably to the holder of the right and cannot be transferred or extended beyond her lifetime.[82] If no dominant tenement exists that could be served by a servient tenement, the right to trade on another individual's parcel of land could be registered in favour of a person in her personal capacity in the form of a positive personal trading servitude, provided that it complies with the requirements for the creation of a limited real right. There is authority in case law for the recognition of a positive personal servitude to trade on a servient tenement that is created and registered in favour of a beneficiary in her personal capacity.[83]

[79] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 138.

[80] A personal servitude could also impose a burden on a movable, which is not considered here. See CG van der Merwe *Sakereg* 2 ed (1989) 506; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 526; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 322; CG van der Merwe "Servitudes and other real rights" in F du Bois (ed) *Wille's principles of South African law* 9 ed (2007) 591 604; AJ van der Walt *The law of servitudes* (2016) 455-464; *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1913 AD 267.

[81] CG van der Merwe *Sakereg* 2 ed (1989) 506; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 338; AJ van der Walt *The law of servitudes* (2016) 455-464; L Kiewitz *Relocation of a specified servitude of right of way* LLM thesis Stellenbosch University (2010) 11. See chapter 3 part 3 3 4.

[82] CG van der Merwe *Sakereg* 2 ed (1989) 506; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 338; AJ van der Walt *The law of servitudes* (2016) 455-464; L Kiewitz *Relocation of a specified servitude of right of way* LLM thesis Stellenbosch University (2010) 11. See chapter 3 part 3 3 2.

[83] *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1913 AD 267 280-282; *Ex parte Steinberg* 1940 CPD 1 5-6; *Bhamjee v Mergold Beleggings (Edms) Bpk* 1983 (4) SA 555 (T) 563; confirmed in *National Stadium South Africa (Pty) Ltd v Firstrand Bank Ltd* 2011 (2) SA 157 (SCA) para 35. See AJ van der Walt "*Novel servitudes Liber Amicorum – essays in honour of JC Sonnekus Sakereg*" 2017 *Tydskrif vir die Suid-Afrikaanse Reg* 408 413.

### 4 3 2 Case law confirming a positive personal trading servitude

In *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd*,[84] the court held that trading rights are limitations upon the rights of ownership and therefore they constitute personal servitudes. The court acknowledged that a positive personal trading servitude can be created which entails the right to trade on the servient tenement in favour of the beneficiary in his personal capacity.[85] Delport and Olivier also confirm that a right to trade on the servient land is an *iura in re aliena* in the form of a personal servitude.[86] However, Lord de Villiers CJ asserted that when trading rights are included as a condition in a lease of land agreement, it will not constitute a personal servitude.[87]

In the later case of *Potgieter and Another v Minty and Sons and Additional Magistrate Barberton*,[88] the court regarded the lease of a trading site upon which a shop was to be built together with the lease of the sole and exclusive right to trade on another's property, not as a contract of lease, but rather a construct resembling something in the nature of a personal servitude in favour of the plaintiff over immovable property belonging to the defendant.[89] Hall and Kellaway correctly assert that the outcome of the *Potgieter* case is difficult to reconcile with the *Willoughby's* case.[90] This is because in *Willoughby's* the court stated that when trading rights are included as a condition in a lease agreement, it will not constitute a personal servitude. *Potgieter* in turn regarded a trading right that was originally embedded in a lease agreement as a personal servitude and not as a contract of lease. Irrespective of the confusion caused by *Potgieter*, it is important to note that the *Willoughby's* decision carries more weight. This is because *Willoughby's* dealt with a personal servitude concerning trading rights and *Potgieter* dealt with the lease of trading rights in the form of a lease agreement. A trading right obtained in the form of a personal servitude differs from a trading right obtained in terms of an unregistered lease agreement. This is because a personal servitude provides a limited real right, whereas a right obtained in terms of an

[84] 1918 AD 1.
[85] The facts will not be discussed here as it has already been discussed in chapter 4 part 4 2 2.
[86] HJ Delport and NJJ Olivier *Sakereg vonnisbundel* 2 ed (1985) 575-576.
[87] *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1913 AD 267 282. See CG Hall *CG Hall & EA Kellaway Servitudes* 3 ed (1973) 182. See also chapter 6 for alternative mechanisms of structuring a right to trade on someone else's property.
[88] 1929 TPD 745 753.
[89] See *Potgieter and Another v Minty and Sons and Additional Magistrate Barberton* 1929 TPD 745 753.
[90] See CG Hall *CG Hall & EA Kellaway Servitudes* 3 ed (1973) 182.

unregistered lease agreement provides a personal right, which is weaker than a real right.[91]

In *Letsitele Stores (Pty) Ltd v Roets and Others*[92] the court accepted (without any argument) that positive trading rights can be constituted as a personal servitude. The court relied on the *Willoughby's*[93] case and the opinions of academic scholars to substantiate the statement.[94] *Letsitele* is also important as it confirms that when a company exercising a positive personal trading servitude is placed under liquidation, the right will not cease to exist. The positive personal trading servitude exercised by such a company, continues to be operative.

In *Mergold Beleggings (Edms) Bpk v Bhamjee en 'n Ande*r,[95] the court held that when the registered owner of a farm (the deceased) sold his property and reserved the trading rights to the farm, a personal servitude was established.[96] In this case, the applicant purchased the servitudal trading rights from the heirs (successors in title) of the deceased (the beneficiary of the personal servitude). The applicant sought a declaratory order to the effect that it had the exclusive right to exercise trading rights on a farm and that it had the exclusive right to lease all the buildings situated on the farm.[97] The first respondent, Bhamjee disputed the applicants' claim to the exclusive right of disposal with regard to the trading rights.[98] Bhamjee based his argument on the fact that his alleged rights arose out of a notarial contract of lease. When the deceased was alive, the deceased leased his trading rights to two tenants in terms of a registered lease agreement. These two tenants consequently ceded the trading rights to subsequent parties who eventually ceded the rights to Bhamjee. The court had to determine whether the applicant or respondent was lawfully entitled to exercise the trading rights and the rights pertaining to the lease of the buildings.

The court held that even though the two lessees had ceded their rights under the notarial contract to Bhamjee, they could not transfer more rights as cessionaries than

[91] See chapters 2 and 6.
[92] 1958 (2) SA 224 (T).
[93] *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1913 AD 267.
[94] CG Hall *CG Hall & EA Kellaway Servitudes* 3 ed (1973) 162; *Letsitele Stores (Pty) Ltd v Roets and Others* 1958 (2) SA 224 (T).
[95] 1983 (1) SA 663 (T).
[96] 1983 (1) SA 663 (T) 673.
[97] 1983 (1) SA 663 (T) 665.
[98] 1983 (1) SA 663 (T) 667.

they had under the notarial contract of lease of trading rights.[99] Furthermore, the court held that the notarial contract of lease of trading rights had lapsed on the death of the original lessees and that any cessionary's rights of subsequent individuals had ceased to exist when they had died.[100] As a result, the respondent, Bhamjee had no lawful claim pertaining to the rights to trade on the farm. In the court *a quo*, the applicant was successful with its application and was granted the exclusive right to exercise trading rights on the farm because the court stated that the applicant purchased the trading rights (personal servitude) from the deceased's heirs in a lawful manner.

On appeal in *Bhamjee en 'n Ander v Mergold Beleggings (Edms) Bpk*,[101] the court rejected the decision of the court *a quo* confirming that the exclusive right to exercise trading rights (personal servitude) could be transferred to the deceased's heirs and subsequently to the applicant. This case is important because it endorses the traditional common law principles of personal servitudes in the context of trading rights. The case confirms that a personal servitude is inalienable and terminates at the death of the holder of the servitude.[102]

Another important case pertaining to a personal servitude concerning trading rights is *Armstrong v Bhamjee*.[103] The facts in *Armstrong* are closely related to the aforementioned *case*. In *Armstrong*, Bhamjee (the respondent) insured the buildings he used for trading purposes. The building was eventually destroyed by a fire and the insurance company refused to pay for the damages and loss suffered by the respondent. The court in *Armstrong* had to determine whether the respondent had any rights to the building when it was destroyed by the fire. In light of the reasons as mentioned in *Mergold Beleggings (Edms) Bpk v Bhamjee en 'n Ande*r,[104] the court held that Bhamjee had no servitudal trading rights with regard to the building.

*Armstrong v Bhamjee* also confirms that the beneficiary of a personal servitude may grant contractual entitlements to a third party which are analogous to the entitlements that he is entitled to exercise in terms of the personal servitude.[105] However, the positive personal trading servitude cannot be alienated or transferred.

[99] 1983 (1) SA 663 (T) 675.
[100] 1983 (1) SA 663 (T) 675.
[101] 1983 (4) SA 555 (T).
[102] 1983 (4) SA 555 (T) 562-564.
[103] 1991 (3) SA 195 (A) 201.
[104] 1983 (1) SA 663 (T).
[105] *Armstrong v Bhamjee* 1991 (3) SA 195 (A) 201.

The third party to such a contractual agreement does not obtain any real rights and can only rely on contractual remedies to protect the contractual agreement he has with the positive personal trading servitude holder.[106] The entitlements of the third party will come to an end when the servitude is terminated, in other words in the case of a personal servitude where the servitude holder dies, or in the case of a juristic person, after a period of 100 years.[107]

As appears from the above discussion, case law seems to support recognition and registration of a positive personal trading servitude (that allows the beneficiary to conduct business on the servient land). In this regard, courts seem to easily conclude that a positive personal servitude in the context of trading rights can exist and be registered.[108] However, this will be subject to the qualification – as with all personal servitudes – that the right is not transferable and that it will terminate when the beneficiary dies or, if the beneficiary is a juristic person, when it is dissolved or after 100 years.[109]

*Willoughby's Consolidated Co Ltd v Copthall Stores Ltd*,[110] still serves as authority that a positive personal trading servitude is possible. In light of the *Willoughby's* case, Hall and Kellaway also confirm that trading rights are limitations upon the rights of ownership that constitute personal servitudes. In addition, they confirm that for these rights to be binding upon successors in title of the grantor these rights ought to be registered.[111] If the positive personal trading servitude of use relates to agricultural land, written consent should be obtained from the Minister responsible for agriculture.[112]

---

[106] *Armstrong v Bhamjee* 1991 (3) SA 195 (A) 202.
[107] Grotius 2 39 15; Van Leeuwen *Cens For* 1 2 15 22 full citation: S van Leeuwen *Censura forensis theoretico practica* (1662); Voet 7 4 1; Van der Keessel *ad Gr* I 2 4 1 full citation: DG van der Keessel *Praelectiones Juris Hodierni ad Hugonis Grotii Introductionem ad jurisprudentiam Hollandicam* (translated by P van Warmelo, LI Coertze, HL Gonin & D Pont (eds)) *Voorlesinge oor die Hedendaagse reg na aanleiding van De Groot se Inleiding tot de Hollandse Rechtsgeleerdheid* (1961-1975); *Johannesburg Municipality v Transvaal Cold Storage Limited* 1904 TS 722 729; *Union Government (Minister of Finance) v De Kock* 1918 AD 22 45; *Goliath v Estate Goliath* 1937 CPD 312 316; CG van der Merwe *Sakereg* 2 ed (1989) 460; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 536.
[108] AJ van der Walt *The law of servitudes* (2016) 507.
[109] *Bhamjee en 'n Ander v Mergold Beleggings (Edms) Bpk* 1983 (4) SA 555 (T); AJ van der Walt *The law of servitudes* (2016) 507. See also chapter 3 for a discussion of the general requirements for the establishment of personal servitudes.
[110] 1913 AD 267; 1918 AD 1.
[111] CG Hall *CG Hall & EA Kellaway Servitudes* 3 ed (1973) 182.
[112] Section 6A(1)(b) of the Subdivision of Agricultural Land Act 70 of 1970.

In addition, as alluded to in chapter 3 parts 3 3 2 3 and 3 4, a right to trade on another individual's land can be categorised as an example of the traditional personal servitude of *usus* due to the fact that the object of a servitude of *usus* is that it provides the servitude holder with a right to use and to occupy property that belongs to another.[113] To trade on another individual's land, the prospective servitude holder would need to use and occupy a building on the servient tenement, to conduct her trade. It was only in *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd*[114] where the court explicitly asserted that the right to trade on another individual's land amounts to using and occupying the property or parts of it for a specific purpose (namely, the right to trade). The court further elaborated that when the right to trade on someone else's property is not embodied as a condition in a lease, it is capable of being granted and registered as a personal servitude. Therefore, it can be inferred that the incorporeal right to trade on another individual's land could be classified as an example of the traditional personal servitude of *usus*.[115] In addition, the incorporeal right to trade on another individual's land could also be categorised as a *servitutes irregulares* as it resembles a praedial servitude but instead it is a personal servitude as it benefits the servitude holder in her personal capacity.[116] It could also in turn be classified as a novel category of personal servitude as alluded to in part 3 3 2 5. I am of the opinion that it does not matter under which category of personal servitude the right to trade on someone else's land is categorised. As the judge mentioned in *Johannesburg Municipality v Transvaal Cold Storage Ltd*,[117] it is not necessary to express a definite opinion regarding the category of personal servitude that accommodates a right to trade on someone else's land. This is because if the condition is classified as a servitude, it is a limited real right, and therefore an interest in land.[118] Therefore, the traditional common law principles pertaining to personal servitudes will also be

[113] CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2 ed (2010) para 600.
[114] 1913 AD 267 282.
[115] *Mergold Beleggings (Edms) Bpk v Bhamjee en 'n Ander* 1983 (1) SA 663 (T) 637 also refers to the *Willoughby's* case.
[116] CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2 ed (2010) para 580 cites the following case law recognising the right to trade on another individual's property as a personal servitude (*servitutes irregulares*) *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1913 AD 267 281; *Potgieter and Another v Minty and Sons and Additional Magistrate Barberton* 1929 TPD 745 753; *Mergold Beleggings (Edms) Bpk v Bhamjee en 'n Ander* 1983 (1) SA 663 (T); *Bhamjee en 'n Ander v Mergold Beleggings (Edms) Bpk* 1983 (4) SA 555 (T). See J Scott "*Bhamjee v Mergold Beleggings (Edms) Bpk* 1983 (4) SA 555 (T) Persoonlike serwituut – aard van – oordraagbaarheid" (1984) 47 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 351.
[117] 1904 TS 722 729.
[118] *Johannesburg Municipality v Transvaal Cold Storage Ltd* 1904 TS 722 729.

applicable to any novel category of servitudes. It appears that no specific formal establishment requirement exists that will preclude the recognition of a positive personal trading servitude.

## 4 4 Conclusion

This chapter sought to evaluate what has become known as positive trading rights. The main purpose of the chapter was to determine whether a right to establish a business and conduct trade on someone else's property, or the entitlement to use another's land as a commercial outlet for the products produced on the dominant tenement could be construed as a praedial or personal servitude. Therefore, the nature and content of a positive trading servitude, if authorised in our law, was placed under the spotlight with the view to determine whether existing case law provides authority for the recognition of praedial or personal servitudes in this context.

This chapter took into consideration the South African legal framework that was explained in the previous two chapters. Chapters 2 and 3 set out the general requirements for the creation of real rights and the establishment requirements for the creation of a praedial and personal servitude. Those two chapters set the platform to determine whether positive trading rights can be recognised as a praedial or personal servitude. Chapter 4 part 4 2 questioned whether a positive praedial trading servitude can be established and what the content of such a servitude would entail. For a praedial servitude to be created, chapter 2 explained that the intention of the parties creating a limited real right must be to bind not only the current owner of the land, but also his successors in title and the right must be of such a nature that it results in a subtraction from the *dominium* of the land against which it is to be registered. In this chapter it has been established that a right to conduct commercial activities on the servient land can be recognised as a limited real right in land that burdens the servient landowner and all her successors in title. However, it appears that the possible hurdle for the recognition of positive trading rights as praedial servitudes is whether they comply with the *utilitas* requirement. The existing case law in South Africa on this topic, namely *Stuart v Grant*,[119] and *Willoughby's Consolidated Co Ltd v Copthall Stores*

[119] (1903) 24 NLR 416 419.

*Ltd*[120] did not specifically question whether a positive praedial trading servitude can in fact be established given the requirement of *utilitas*. As a result, an investigation was conducted in chapter 4 part 4 2 3 to determine in relation to the fundamental principles of South African law, whether it is possible to recognise a category of positive praedial trading servitudes.

South African literature indicates that the *utilitas* requirement is satisfied and that a positive praedial trading servitude is possible if the use of the dominant land complies with certain development-and-appointment requirements. A *direct link* should exist between the servient tenement and the dominant tenement.[121] Although none of the South African cases explicitly address the issue of whether these positive trading rights can in fact amount to praedial servitudes, chapter 4 part 4 2 3 proves that it can, provided that it complies with the somewhat wider interpretation of the *utilitas* requirement, which entails that the servitude should increase the utility of the dominant tenement in accordance with the tenement's economic, industrial or professional purpose and that the use of the dominant tenement complies with certain development-and-appointment requirements as suggested by De Waal.

Hypothetical examples to substantiate this claim illustrate instances where a positive praedial trading servitude might be possible. In light of the practical examples provided in part 4 2 3 3 of this chapter, it is clear that a servitude would quite easily comply with the establishment requirements for a praedial servitude if there are two tenements, and if the *utilitas* and passivity requirement have been complied with. This chapter illustrated by means of practical examples what a positive praedial trading servitude could potentially look like. For example, the content of a positive praedial trading servitude could encompass a market square. The composition of such a servitude would entail selling goods produced on the dominant tenement at an outlet on the servient tenement that serves as a market square. It can be envisaged in such a case that a direct link exists between the dominant and servient tenements provided that the dominant tenement should be developed and appointed for a specific relatively durable use such as a farm. Another example is where the dominant tenement is developed and appointed as an oil refinery, brewery or specific factory. The servient

[120] 1913 AD 267; 1918 AD 1.

[121] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 180-181, 185. See AJ van der Walt *The law of servitudes* (2016) 143 footnote 313 and AJ van der Walt "*Novel servitudes Liber Amicorum – Essays in honour of JC Sonnekus Sakereg*" 2017 *Tydskrif vir die Suid-Afrikaanse Reg* 408 footnote 23.

tenement should in turn be developed as a petrol station, restaurant or sports field for such a servitude construct to work. The dominant owner's right to trade on the servient land should be *closely* related to the use and enjoyment of the dominant tenement (in other words, according to the dominant tenement's actual development, appointment and used for a specific purpose).[122] In this regard, it could probably be said that if the requirements are complied with, the establishment requirements for the creation of a positive praedial trading servitude will be unproblematic to the extent that it does not pose a prohibition on the creation of such categories of servitudes. A positive trading right cannot be established as a praedial servitude if it satisfies the mere personal pleasure of an individual owner. To draw a clear line as to whether a potential trading right benefits the land or the interests of the owner, academic authors propose valuable guidelines that assist in making this distinction.[123] Given the fact that cases have not specifically addressed the issue of creating positive praedial trading servitudes, it appears that positive praedial trading servitudes if recognised would be a novel category of servitudes in South African law.

As appears from chapter 4 part 4 3, case law seems to support (quite clearly) the recognition and registration of a positive *personal* trading servitude (that allows the beneficiary to conduct business on the servient land). Therefore, where positive trading rights may not have been explicitly recognised in South African case law as a praedial servitude, there is certainly clearer authority in the context of recognising these rights as personal servitudes. As in the case of other recognised forms of personal servitudes such as *usus*, *usufructus* and *habitatio*, the recognition of a novel category of personal trading servitudes will also be subject to the rule that the right is not transferable and will terminate when the beneficiary dies or, if the beneficiary is a juristic person, when it is dissolved or after 100 years.[124] This was shown in the *Bhamjee* judgment. It is also

[122] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 207.
[123] AJ van der Walt *The law of servitudes* (2016) 133. See chapter 3 2 2 5: MJ de Waal; *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch (1989) 203-209; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 589; AJ van der Walt *The law of servitudes* (2016) 134 for a detailed discussion of the list of criteria proposed by various academic scholars. Van der Merwe and De Waal on the other hand support the idea that a combination of factors or criteria should be taken into consideration to determine whether the benefit provided by the servient tenement is closely linked to the use of the dominant tenement. See CG van der Merwe "Die nutsvereiste by erfdiensbaarhede" in DJ Joubert (ed) *Petere Fontes: LC Steyn Gedenkbundel* (1980) 163-176; MJ de Waal; *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch (1989) 203-209.
[124] *Bhamjee en 'n Ander v Mergold Beleggings (Edms) Bpk* 1983 (4) SA 555 (T); AJ van der Walt *The law of servitudes* (2016) 507.

important to take note with regard to positive personal trading servitudes that the *Bhamjee* case confirmed that a beneficiary of the personal servitude may lease trading rights to a third party. However, such a personal servitude may not be alienated or transferred in line with the general rules regulating personal servitudes. The third party to such a contractual agreement does not acquire any real rights and can only rely on contractual remedies to protect the contractual agreement she has with the personal servitude holder. The entitlements of the third party will come to an end when the servitude is terminated. In other words, in the case of a personal servitude, where the servitude holder dies, or in the case of a juristic person, after a period of 100 years.

To finally conclude, it is clear that a positive praedial and personal trading servitude are conceivable in South African law. However, the intention of the parties, terms and conditions of the agreement and surrounding circumstances will be vital to determine the category that accommodates a right to trade on someone else's land. The subsequent chapter will focus on the category of negative trading rights and will set out the nature and content of these rights with the view to determine whether existing case law supports (or should support) the structuring of these types of trading rights as praedial and/or personal servitudes.

# Chapter 5: Right to prohibit another from trading on the servient tenement

## 5 1 Introduction

The purpose of chapter 5 is to analyse and explain the factors that influence the recognition of negative trading servitudes in order to determine under which circumstances a right to prevent another from trading on their own property to protect the dominant tenement from commercial competition (a right in restraint of trade) can either be structured as a negative praedial trading servitude or a negative personal trading servitude. The secondary purpose is to provide the precursor to chapter 6, which will consider alternative ways of structuring agreements that prohibit trading on another's property. In other words, if the right to prohibit someone from trading on their own property is not specifically structured as a negative trading servitude, it will be questioned whether exclusive use covenants could perhaps be embedded in long-term commercial lease agreements as an alternative instrument to protect the rights of anchor retail tenants in shopping centers against fellow competitors.[1]

The first part of this chapter will focus on the category of negative praedial trading servitudes. South African case law pertaining to negative praedial trading servitudes will be analysed extensively to determine whether there is a general tendency to recognise negative trading rights as praedial servitudes in South African law. The legal position of Louisiana pertaining to negative praedial trading servitudes will also be analysed briefly as this area of law is also contested among academic scholars in that jurisdiction and it will be interesting to see whether there are valuable lessons to be learned from the approach in Louisiana. A policy analysis relating to negative praedial trading servitudes in general will be set out and a solution to clear up the murky area of the law relating to negative trading servitudes will be proposed.

The second part of the chapter will focus on the category of negative trading rights in the form of personal servitudes and will be discussed with regard to the legal position in both South Africa and Louisiana.

[1] See chapter 6.

## 5 2 Negative praedial trading servitudes in South African law

### 5 2 1 Introduction

South African case law has been inconclusive for a long period of time regarding the recognition of a praedial servitude in restraint of trade.[2] However, Van der Merwe has found authority in two older cases (*Tonkin v Van Heerden*[3] and *Venter v Minister of Railways*[4]) as examples for the recognition of negative praedial trading servitudes in South African law.[5] De Waal maintains that the two older cases that Van der Merwe relies on should not be regarded as authority because the servitudes in those cases did not comply with the establishment requirements for praedial servitudes.[6] Both Van der Merwe and De Waal reject the reasoning of the court in *Hollman v Estate Latre*[7] for acknowledging rights that should not be registered as praedial servitudes.[8] As discussed in chapters 3 and 4, the biggest problem with recognition of trading servitudes as praedial servitudes is whether they comply with the *utilitas* requirement. The two cases that Van der Merwe relied on, and the case which both Van der Merwe and De Waal disagree with, will be discussed extensively in part 5 2 2 to determine whether they in fact comply with the *utilitas* requirement. *Ex parte Steinberg and Others*,[9] will also be analysed to the extent that the court would have been prepared to regard a specific condition as a praedial servitude without taking the *utilitas* requirement into consideration. These decisions will illustrate how easy it has been for courts to fall into the trap of reaching incorrect conclusions. Erroneous conclusions are reached because courts fail to conduct a proper investigation to determine whether the particular restraint of trade agreement is in fact in compliance with the requirements for the establishment of praedial servitudes. Part 5 2 3 in turn will discuss case law that

[2] AJ van der Walt "*Novel servitudes Liber Amicorum – Essays in honour of JC Sonnekus Sakereg*" 2017 *Tydskrif vir die Suid-Afrikaanse Reg* 408 413.
[3] 1935 NPD 589.
[4] 1949 (2) SA 178 (EC).
[5] CG van der Merwe "Die nutsvereiste by erfdiensbaarhede" in DJ Joubert (ed) *Petere Fontes: LC Steyn Gedenkbundel* (1980) 163 172; AJ van der Walt *The law of servitudes* (2016) 140-141; AJ van der Walt "*Novel servitudes Liber Amicorum – Essays in honour of JC Sonnekus Sakereg*" 2017 *Tydskrif vir die Suid-Afrikaanse Reg* 408 413.
[6] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 185-186, 190-192. See also AJ van der Walt "*Novel servitudes Liber Amicorum – Essays in honour of JC Sonnekus Sakereg*" 2017 *Tydskrif vir die Suid-Afrikaanse Reg* 408 413. See chapter 3 part 3 2 2 5.
[7] 1970 (3) SA 638 (A).
[8] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 194-195.
[9] 1940 CPD 1.

serves as persuasive and arguably correct authority for recognising a negative praedial servitude in restraint of trade and part 5 2 4 will summarise the circumstances under which restraint of trade conditions could quite rightly be registered as a praedial servitude.

### 5 2 2 Case law erroneously confirming a negative praedial servitude in restraint of trade

In *Tonkin v Van Heerden*[10] the applicant's late husband, John Tonkin, had been the owner of a farm on which he carried on farming operations.[11] A trading store site of 30 acres of land formed part of the farm. This portion of land was let to a trading firm and the lessees were granted the sole rights to trade on the farm. On 25 August 1925, the farm was sold by the executors of John Tonkin's estate to MC Jacobs and P van Heerden (the current respondent). The trading store site comprising of 30 acres of land was excluded from the sale of the farm. On the same date when the farm was sold to MC Jacobs and P van Heerden, the site of the store of 30 acres of land was transferred to the applicant as part of her inheritance in accordance with the will of her late husband, John Tonkin. It is with regard to the lot of land containing the trading store that the application was made. The ensuing two conditions of sale were signed on behalf of the two purchasers on 25 August 1925:

> "The farm is sold exclusive of the present store and 30 acres adjoining and grazing rights until the 1st November, 1925."
>
> "The purchaser shall not have the right to trade upon the farm apart from disposing of his *bona fide* stock and crops and produce grown by him on the said farm."[12]

The transfer of the purchased land took place without the restraint of trade clause. The applicant consequently applied to court for an order directing registration of the servitude, requiring that the respondent execute the necessary documents in order to effect registration of the servitude against the title deed of the property belonging to the respondent. The applicant presented a number of arguments to substantiate her case that the abovementioned condition of sale was of a servitudal nature (conferring

[10] 1935 NPD 589. See also CG Hall *CG Hall & EA Kellaway Servitudes* 3 ed (1973) 182; HJ Delport & NJJ Olivier *Sakereg vonnisbundel* 2 ed (1985) 576; MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 185-187.
[11] *Tonkin v Van Heerden* 1935 NPD 589 591.
[12] *Tonkin v Van Heerden* 1935 NPD 589 591.

real rights) and therefore registerable.[13] In the first place, the applicant argued that the question that should be addressed involves the interpretation of the abovementioned condition of sale.[14] In addition, the applicant reasoned that a servitude is constituted if the condition affects the user of the property in that it restricts the rights of ownership. The applicant further asserted that to determine the question whether a real right is constituted one has to determine the intention of the parties.[15] The relevant condition was established in favour of the trading site of Mrs Tonkin and because the condition was enforced upon a portion of the land (the 30 acres of land excluded from the sale), the condition would be valueless if not registered. Therefore, it must be implied that it was the intention to create a praedial servitude and that the servitude should be registered.[16]

The respondent in turn argued that the onus is on the applicant to establish that the parties had the intention to create a servitude. Furthermore, the respondent argued that there was no reference to a dominant tenement and the respondent had no knowledge of the seller's intention to create a servitude. Consequently, the intention was arguably that the respondent would be bound to the restraint of trade clause in his personal capacity and the right would not be enforceable against subsequent purchasers.[17]

The court dealt with the matter as a question of interpretation of the conditions of sale signed on behalf of the purchasers.[18] The surrounding circumstances which were within the knowledge of both parties to the agreement were also taken into consideration. It was concluded that the parties intended for a servitudal agreement to be created. The court stated that the effect of the clause was to exclude the right to trade on the farm from the rights obtained through the sale agreement. The reason for the exclusion of the right to trade was intended for the benefit of Mrs Tonkin's portion

[13] *Tonkin v Van Heerden* 1935 NPD 589 590. The applicants relied on *Ex parte Geldenhuys* 1926 OPD 155; *Ex parte Jerrard* 1934 WLD 87.
[14] *Tonkin v Van Heerden* 1935 NPD 589 590. The applicant referred to *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1918 AD 1 16; *Administrator (Transvaal) v Industrial Timber Co* 1932 AD 33.
[15] *Tonkin v Van Heerden* 1935 NPD 589 590. The applicant referred to Voet 8 3 12: Full citation J Voet 1625-1682 *Commentarius ad Pandectas* translated by P Gane *Commentary on the Pandect* (1955-1958). See chapter 2 for a discussion of the requirements pertaining to the creation of a limited real right.
[16] *Tonkin v Van Heerden* 1935 NPD 589 590. The applicant relied on *Hollins v Registrar of Deeds* 1904 TS 603; *Jansen v Fincham* 9 SC 289 293; *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1918 AD 1 16.
[17] *Tonkin v Van Heerden* 1935 NPD 589 590, 592; MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 185-186.
[18] *Tonkin v Van Heerden* 1935 NPD 589 592.

of the farm.[19] The court referred to the judgments of *Jansen v Fincham*[20] and *Consistory of Steytlerville v Bosman*,[21] where it was held that the intention was that something should be "carved out of the full *dominium* or the rights of ownership" and reserved by the sellers for the benefit of that portion of the farm which was not being sold, but which was subsequently transferred to the widow.[22]

Therefore, the court was implying that a subtraction from the *dominium* did occur, and that a limited real right in land was consequently established in favour of Mrs Tonkin. The court's approach in this regard is problematic as the court arrived at its conclusion based on the intention of the parties to the contractual agreement without considering whether such a servitude would be in compliance with the requirements for the establishment of a praedial servitude. The intention of the parties is not sufficient to determine whether a praedial servitude has been validly created. It is arguably always necessary to also determine whether the establishment requirements for a praedial servitude have been satisfied before a praedial servitude is acknowledged.[23] The court should at least be commended for determining that the servitude in restraint of trade constituted a limited real right because it amounted to a subtraction from the *dominium* and the intention of the parties was to create a limited real right in the form of a servitude.

It is important to distinguish whether a court would regard the restraint of trade condition as a negative personal trading servitude or as a negative praedial trading servitude. It can be inferred from the following statement made by Feetham JP that the court in the *Tonkin* case regarded the servitude in question as a praedial servitude.[24]

[19] *Tonkin v Van Heerden* 1935 NPD 589 593.
[20] (1892) 9 SC 289 292.
[21] 10 SC 67 69.
[22] *Tonkin v Van Heerden* 1935 NPD 589 593.
[23] MJ de Waal "Die moderne aanwending van grondserwitute: Eiendomsreg en die beheer oor die ontwikkeling van ander saaklike regte" 1995 *Tydskrif vir die Suid-Afrikaanse Reg* 193 210; MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 186.
[24] MJ de Waal "Die moderne aanwending van grondserwitute: Eiendomsreg en die beheer oor die ontwikkeling van ander saaklike regte" 1995 *Tydskrif vir die Suid–Afrikaanse Reg* 193 210.

> "If the effect of the conditions of sale was that the purchasers agreed to the creation of a servitude *in favour of the remaining portion of the farm* which was excluded from the sale, the applicant, who is now owner of that portion, is entitled to claim delivery of the servitude, which can only be effected by registration…"[25]

It was illustrated in chapter 3 that once a novel trading servitude is recognised in the form of a limited real right in land, the subsequent question in the methodological approach should be to determine what type of servitude comes into existence (praedial or personal).[26] This means that the next step should logically be to embark on an analysis of the establishment requirements for a praedial or a personal servitude depending on which one of the two categories of servitudes is most applicable to the circumstances and issue at hand. The court arrived at its conclusion, namely that the respondents agreed to the creation of a servitude in favour of the remaining portion of the farm, which belonged to Mrs Tonkin, without considering whether it was in compliance with all the establishment requirements for a praedial servitude, as it is always necessary to establish whether these requirements have been satisfied before a praedial servitude is acknowledged.[27] These requirements should be fulfilled to prevent a proliferation of praedial servitudes and undue impediments on land.[28] Since two plots of land are involved[29] in this particular case it already indicates that a praedial servitude is probably more suitable. One of the further essential establishment requirements of a praedial servitude is that it is established in favour of another dominant tenement and not another person.[30] It is notoriously difficult for negative servitudes (like restraint of trade agreements) to satisfy the *utilitas* requirement because it appears at face value to merely serve the interests of a specific business or

---

[25] *Tonkin v Van Heerden* 1935 NPD 589 593 (own emphasis added).
[26] See chapters 2 and 3.
[27] MJ de Waal "Die moderne aanwending van grondserwitute: Eiendomsreg en die beheer oor die ontwikkeling van ander saaklike regte" 1995 *Tydskrif vir die Suid-Afrikaanse Reg* 193 210; MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 186. See chapter 3 for a discussion of the requirements pertaining to the establishment of a praedial and personal servitude.
[28] CG van der Merwe "Servitudes and other real rights" in F du Bois (ed) *Wille's principles of South African law* 9 ed (2007) 591 593; WM Gordon & MJ de Waal "Servitudes and real burdens" in R Zimmerman, D Visser & KGC Reid (eds) *Mixed legal systems in comparative perspective* (2004) 735 738, 743. See discussion in L Kiewitz *Relocation of a specified servitude of right of way* LLM thesis Stellenbosch University (2010) 12. See also chapter 3.
[29] See chapter 3 part 3 3 2.
[30] CG van der Merwe *Sakereg* 2 ed (1989) 459; MJ de Waal "Die moderne aanwending van grondserwitute: Eiendomsreg en die beheer oor die ontwikkeling van ander saaklike regte" 1995 *Tydskrif vir die Suid-Afrikaanse Reg* 193 210; MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 186. See chapter 3 part 3 2 2 5 for a discussion of the *utilitas* requirement.

person instead of providing a distinct benefit to the dominant tenement.[31] The court did not discuss the requirement of *utilitas* as a necessary condition for the establishment of a praedial servitude in restraint of trade. Even though Van der Merwe[32] regards the *Tonkin* case as authority for the recognition of a negative praedial servitude in restraint of trade, De Waal[33] correctly argues that the *Tonkin* case is an example of a situation where there was arguably no compliance with the *utilitas* requirement. Therefore, had the court engaged with the requirement (as it should have), it should have come to the conclusion that a praedial servitude was not established in this context.

The *utilitas* requirement was not satisfactorily complied with since the dominant tenement (the 30 acres of land belonging to Mrs Tonkin) was not *specifically* developed for a particular trade or industry that could have benefited from the restraint of trade on a relatively durable basis.[34] The somewhat wider interpretation (which seems to be the dominant interpretation adopted in relation to the *utilitas* requirement) provides more flexibility as it envisages that the servitude should increase the utility or usefulness of the dominant tenement in accordance with the tenement's economic, industrial or professional purpose (and not only with regard to its natural condition or to its agricultural use).[35] In this regard, the interpretation of the *utilitas* requirement potentially accommodates the creation of novel categories of servitudes such as negative praedial servitudes in restraint of trade. In addition to the somewhat wider interpretation of the *utilitas* requirement, De Waal suggests that if courts should consider the notion of a servitude to restrain trade on the servient tenement, the facts of the particular case should establish that a *direct link* should exist between the servient tenement and the dominant tenement.[36] In other words, it must be proven that the servitudal right is clearly related to the use and enjoyment of the dominant

---

[31] AJ van der Walt "*Novel servitudes Liber Amicorum – Essays in honour of JC Sonnekus Sakereg*" 2017 *Tydskrif vir die Suid-Afrikaanse Reg* 408 413.

[32] CG van der Merwe "Die nutsvereiste by erfdiensbaarhede" in DJ Joubert (ed) *Petere Fontes: LC Steyn Gedenkbundel* (1980) 163 172. AJ van der Walt *The law of servitudes* (2016) 140-141; AJ van der Walt "*Novel servitudes Liber Amicorum – Essays in honour of JC Sonnekus Sakereg*" 2017 *Tydskrif vir die Suid-Afrikaanse Reg* 408 413.

[33] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 186.

[34] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 185-186, 190-192; AJ van der Walt *The law of servitudes* (2016) 141.

[35] AJ van der Walt *The law of servitudes* (2016) 129.

[36] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 180-181, 185; AJ van der Walt "*Novel servitudes Liber Amicorum – Essays in honour of JC Sonnekus Sakereg*" 2017 *Tydskrif vir die Suid-Afrikaanse Reg* 408 413-414.

tenement in accordance with its actual development, appointment and use of the dominant tenement for a specific purpose.[37]

Mrs Tonkin's servitudal right was not clearly related to the use and enjoyment of her dominant tenement in accordance with a specific trade purpose. The trade on the dominant tenement was of a general nature. It appears that the servitude was established to satisfy the personal interests and delight of Mrs Tonkin. As a result, it should arguably not have been established as a praedial servitude but rather (at best) as a negative personal trading servitude. Caution should be exercised by our courts, to prevent such mistakes from happening. Besides not complying with the *utilitas* requirement, placing a general bar on the new servient tenement owner not to engage in trading other than the right from disposing of his *bona fide* stock and crops and produce grown by him on the said farm[38] is definitely excessive as it burdens the land unnecessarily. The following case is another example where the court confirmed the establishment of a negative praedial servitude even though there was no engagement with the *utilitas* requirement.

In *Venter v Minister of Railways*[39] the Colonial Government took transfer of a portion of the farm Leeuwfontein. At that time Estcourt was the registered owner of the whole of Leeuwfontein. The deed of transfer to the Colonial Government prohibited the Colonial Government from trading on the purchased land except with regard to "Railway Refreshment Rooms and Bars and any business connected with the dealing of traffic in the public interests."[40] The applicant, a successor in title to Escourt, owned a portion of the farm Leeuwfontein (Part A). On this portion of land he conducted a business of a general dealer, where he sold soft goods, groceries, meal, mealie meal, vegetables etcetera. The applicant complained that the respondent contravened the restraint of trade condition at the Refreshment Room on the Railway Station by selling the abovementioned goods. Part B of the farm was owned by Railway Administration and was under the control of the Minister of Railways. The applicant sought an interdict

[37] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 168-209; AJ van der Walt "*Novel servitudes Liber Amicorum – Essays in honour of JC Sonnekus Sakereg*" 2017 *Tydskrif vir die Suid-Afrikaanse Reg* 408 413-414.
[38] *Tonkin v Van Heerden* 1935 NPD 591.
[39] 1949 (2) SA 178 (EC). See specifically CG Hall *CG Hall & EA Kellaway Servitudes* 3 ed (1973) 183; HJ Delport & NJJ Olivier *Sakereg vonnisbundel* 2 ed (1985) 548-549; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 613; MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 190-192.
[40] *Venter v Minister of Railways* 1949 (2) SA 178 (EC) 180.

prohibiting the Railway Refreshment Rooms from selling goods on the property in contravention of the abovementioned condition.

The respondent contended that the condition was contrary to public policy because the condition was of a perpetual nature.[41] Hoexter JP rejected the argument of the respondent and reasoned that the condition in the deed of transfer constituted a praedial servitude against the property transferred and in favour of the property registered in the name of the applicant.[42] The court stated that a praedial servitude comes into existence if the right to be acquired by the owner of the dominant tenement is for the *perpetual benefit* of the tenement.[43] *Perpetua causa* is a notable feature to determine the utility of the servient tenement to the dominant tenement.[44] Therefore, the existence of a praedial servitude cannot be attacked on the basis that the restraint of trade is unlimited in time. The rules as to contracts in restraint of trade cannot be applied to praedial servitudes. The essence of a contract in restraint of trade is that it has the effect of restraining the trading activity of a particular individual for a limited period of time. On the other hand, a restraint of trade created by a praedial servitude presumably restricts the use of a particular piece of property with the effect of binding all the successors in title of the servient tenement owner.

Even though the court's explanation appears to suggest that a limited real right was created, the problem with the judgment is that Hoexter JP concluded that a praedial servitude could be created,[45] without determining if the condition can in fact be construed as a praedial servitude, given the specific establishment requirement of *utilitas* for a praedial servitude. This is similar to the problem with the *Tonkin* case. De Waal argues that the approach followed by Hoexter JP and the conclusion reached by

[41] *Venter v Minister of Railways* 1949 (2) SA 178 (EC) 184.
[42] *Venter v Minister of Railways* 1949 (2) SA 178 (EC) 184-185.
[43] *Venter v Minister of Railways* 1949 (2) SA 178 (EC) 185. See chapter 3 part 3 2 4 for the discussion of the *perpetua causa* principle as an establishment requirement for a praedial servitude. It is not an independent requirement as it is linked to the establishment requirements of *vicinitas* and *utilitas*. *Perpetua causa* has always been regarded as a notable feature to determine the utility of the servient tenement to the dominant tenement. See CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2 ed (2010) para 548.
[44] *Venter v Minister of Railways* 1949 (2) SA 178 (EC) 185. See chapter 3 part 3 2 2 4. See also CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2 ed (2010) para 548.
[45] *Venter v Minister of Railways* 1949 (2) SA 178 (EC) 185. See also MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 190-192.

him in the *Venter* case was illogical.[46] The implication of his approach is that he attributed the characteristics of a praedial servitude to the condition in dispute and used one of the characteristics of a praedial servitude, namely *perpetua causa*, to reject the argument made by the respondent, namely that the condition in dispute was against public policy.[47]

Furthermore, it is not sufficient if a particular condition meets the requirements of a real right (the intention and subtraction from *dominium* test) in *abstracto* in the sense that it can be envisaged that the condition may have the effect of restricting the owner's rights. Even though the condition constitutes a limited real right, one should not only apply the criteria for the establishment of a limited real right, there are also other more specific existing requirements for praedial servitudes that should be taken into consideration as well.[48] It is important to understand and contextualise the requirements for the establishment of a praedial servitude and to examine the underlying principles to enable application thereof to the issue at hand.

As alluded to in the criticism mentioned earlier against the *Tonkin* judgment, the second part of the methodological approach highlighted in chapter 3 entails determining whether the content of the clause or condition can be established as a praedial servitude in accordance with the facts of the specific situation and the particular establishment requirements for the creation of such a servitude. One has to determine whether the specific limited real right amounts to a personal or praedial servitude. In light of the fact that two plots of land are involved, it already seems to indicate that a praedial servitude may potentially have been created, but that alone is not sufficient as there are additional requirements that must be fulfilled.[49] Even if the intention of the original parties to the agreement was to create a praedial servitude it still has to be evaluated whether such an agreement complies with the common law requirements to establish a praedial servitude.[50] If it does, a praedial servitude will have

---

[46] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 191.
[47] *Venter v Minister of Railways* 1949 (2) SA 178 (EC) 185: "A praedial servitude comes into existence only if the right to be acquired by the *praedium dominans* is for its perpetual benefit. It follows that a praedial servitude can never be attacked on the ground that the restraint created by it is unlimited in point of time." See MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 191.
[48] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 191. See chapters 2 and 3.
[49] See chapter 3.
[50] See chapter 3 part 3 2.

been created. As argued before, trading servitudes' compliance with the *utilitas* requirement is normally problematic whether the trading right is of a positive or negative nature.[51] Therefore, in all potential trading servitude cases, it should be determined whether the *utilitas* requirement is complied with. Similarly as in the *Tonkin* judgment, the dominant tenement in the *Venter* case was a farm on which a *general* trading business was conducted.[52] Therefore, it cannot be said that the dominant tenement was specially appointed for a specific trade or industry. As emphasised in chapters 3 and 4, parts 3 2 2 5 and 4 2 3 it must be verified that the servitudal right is clearly related to the use and enjoyment of the dominant tenement in accordance with the actual development, appointment and use of the dominant tenement for a specific purpose.[53] Furthermore, it cannot be said that the restraint of trade clause in the *Venter* case served anything more than the mere personal interests of the owner of the dominant tenement. For that reason, a praedial servitude should arguably not have been created in the *Venter* case because the *utilitas* requirement was not satisfactorily complied with since the dominant tenement was not developed for a specific use that could have benefited from the restraint of trade on a relatively durable basis.[54]

If courts do not apply a strict analytical method when confronted with these disputes, a proliferation of burdens on land will be encouraged. This jurisprudential trend will undermine the legal principles in place to prevent a proliferation of burdens on land. If a restraint of trade is acknowledged as a praedial servitude, it will have the effect of not only binding the original parties to the agreement, but their successors in title as well.[55] Therefore, caution should be exercised in order to establish whether a specific condition or restraint of trade clause should take the form of a praedial servitude. The following case that will be discussed also recognised a negative praedial servitude in restraint of trade.

---

[51] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 168-209.
[52] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 192.
[53] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 168-209; AJ van der Walt "*Novel servitudes Liber Amicorum – Essays in honour of JC Sonnekus Sakereg*" 2017 *Tydskrif vir die Suid-Afrikaanse Reg* 408 413-414.
[54] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 185-186, 190-192; AJ van der Walt *The law of servitudes* (2016) 141.
[55] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 191.

In *Hollman and Another v Estate Latre*[56] the appellants were the registered owners in equal undivided shares of two portions of land that was initially part of a large farm. A hotel and liquor trade store was constructed on these two portions of land owned by the appellants (the dominant tenement). A servitude was registered in favour of these two portions of land when it was sold to the appellants' predecessors in title. The deed stipulated that the appellants had the exclusive right of trading as a general dealer and/or liquor license holder on the remainder of the original farm (servient tenement).[57] However, since the servitude was granted and registered in 1924 none of the owners of the dominant tenement had implemented any right to trade on any of the lots of the servient tenement for a period longer than the prescriptive period of one-third of a century. The legal question that had to be determined was whether the exclusive right to trade on the servient tenement prescribed as a result of non-user. The appellants nonetheless sought an order confirming that a praedial servitude was registered in favour of the dominant tenement.

In the court a *quo* an order was granted stipulating that the appellants have a valid praedial servitude pertaining to the servient tenement, which entitled them to prevent any other persons from trading on the servient tenement, as general dealers or liquor licence holders.[58] An appeal was lodged against the decision of the court of first instance. On appeal the order of the court of first instance was set aside and an order dismissing the application was substituted based on the fact that the exclusive right of trading had become prescribed.[59]

What is interesting is that the appellants argued that the grant in the deed, namely the positive exclusive right to trade on the servient tenement is essentially worded as a negative praedial servitude. To substantiate this argument, the appellants contended that a right to trade on another individual's land cannot constitute the content of a praedial servitude because such a servitude would not create any economic benefit in favour of the dominant tenement.[60] They argued that it is only the right to restrain trade on the servient tenement that could create an economic benefit for the dominant tenement which will justify the establishment of a praedial servitude. Therefore, they insisted that the right conferred to them must accordingly be regarded as a right to

[56] 1970 (3) SA 638 (A).
[57] 1970 (3) SA 638 (A) 643.
[58] 1970 (3) SA 638 (A) 643.
[59] 1970 (3) SA 638 (A) 643.
[60] 1970 (3) SA 638 (A) 644.

restrain trade in order for it to rank as a praedial servitude. Additionally, they argued that a negative praedial servitude in restraint of trade cannot be extinguished by non-user. Steyn CJ replied to their argument as follows:

> "The proposition that the mere right to trade on another's property, even if granted to successive owners of another property, cannot qualify as a praedial servitude, is not by any means unassailable. There is authority … pointing the other way. Brunneman, Com ad Dig, 8 1 19 and Voet, 8 4 15 for instance, appear to be of the view that a servitude would qualify as a praedial servitude if it would raise the price of the dominant tenement …"[61]

It appears from the abovementioned statement that Steyn CJ attempted to discredit the argument of the appellants that a right to trade on a servient tenement cannot be established in the form of a positive praedial trading servitude. Steyn CJ held that the positive right to trade on another individual's property is closely interwoven with the right to prevent another from conducting trade activities on the servient tenement. Such a right to prohibit trade on the servient tenement serves the dominant tenement to the extent that it protects any trading activities that may be carried out on the dominant tenement against competition of similar trading activities on the servient tenement.[62] Hence, Steyn CJ asserted that it constitutes a praedial servitude.[63]

The *Hollman* case confirms two forms of praedial servitudes in the context of trading rights, namely a servitude to trade on the servient tenement and a servitude to prevent trade on the servient tenement.[64] De Waal notes that the *Hollman* case is similar to *Hotel De Aar v Jonordon Investment (Edms) Bpk*.[65] This is so because in the *Hotel De Aar* case it was held that a negative praedial servitude of restraint of trade can be established to ensure business certainty, and in the *Hollman* case, the court formulated the purpose of a negative praedial servitude in restraint of trade more

---

[61] *Hollman and Another v Estate Latre* 1970 (3) SA 638 (A) 644; MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 192-193. Van der Merwe criticises this judgment in so far as a praedial servitude in restraint of trade on the servient tenement has occurred, where the court took into consideration that it is sufficient that the servitude increased the market value of the dominant land. Van der Merwe argues that because this decision by implication does not require a direct link of land-use between the servitude and the dominant tenement, it abandons the *utilitas* requirement. See AJ van der Walt *The law of servitudes* (2016) 144; CG van der Merwe "Die nutsvereiste by erfdiensbaarhede" in DJ Joubert (ed) *Petere fontes: LC Steyn gedenkbundel* (1980) 163 173-174.

[62] 1970 (3) SA 638 (A) 645.

[63] 1970 (3) SA 638 (A) 645.

[64] *Hollman and Another v Estate Latre* 1972 (2) SA 400 (A); MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 193.

[65] 1972 (2) SA 400 (A); MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 193. The *Hotel de Aar* case will be discussed in parts 5 2 2-5 2 4.

simplistically.[66] The court stated that the right to trade on and over the servient tenement, serves the dominant tenement indirectly because it protects trading activities that may be conducted on the dominant tenement. As a result, it prevents competition of similar activities on the servient tenement and creates business certainty for the dominant tenement.[67] As a result, it satisfies the *utilitas* requirement and therefore it constitutes a praedial servitude.[68] The problem with this argument of Steyn CJ is that the *utilitas* requirement cannot merely be satisfied due to the fact that it protects the dominant tenement against commercial competition.[69]

Steyn CJ in the *Hollman* case held that the establishment of a praedial servitude is possible if the financial value of the dominant tenement is increased as a result of the servitude. Even though he did not state it explicitly, he acknowledged the fact that the *utilitas* requirement will be complied with if the financial value of the dominant tenement is increased.[70] De Waal mentions that Steyn CJ's judgment is clearly *obiter*. According to the facts of the case and the nature of the legal question that had to be addressed, it was not necessary for Steyn CJ to determine whether the *utilitas* requirement had been complied with because the servitude had prescribed. His discussion of the *utilitas* requirement was merely a response to one of the arguments provided for by the appellants. Additionally, the common law that Steyn CJ relied upon, is not noteworthy since convincing common law authority exists for the perspective that the *utilitas* requirement has never been implemented as widely as appears from this *obiter* judgment.[71] The argument that the mere increase in financial value of the dominant tenement justifies the establishment of a praedial servitude, has been treated sceptically in case law.[72]

---

[66] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 193.
[67] *Hollman and Another v Estate Latre* 1970 (3) SA 638 (A) 645.
[68] *Hollman and Another v Estate Latre* 1970 (3) SA 638 (A) 645.
[69] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 194.
[70] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 194; CG van der Merwe "Die nutsvereiste by erfdiensbaarhede" in DJ Joubert (ed) *Petere Fontes: LC Steyn gedenkbundel* (1980) 163 163. This is not a plausible interpretation of the *utilitas* requirement as this approach will have the effect of negating the *utilitas* requirement and may result in unbearable burdens on servient tenements. See chapter 3 part 3 2 2 5 for a discussion discrediting the even wider interpretation of the *utilitas* requirement.
[71] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 195. See chapter 3 part 3 2 2 5.
[72] See chapter 3 part 3 2 2 5.

In *Lorentz v Melle and Others*,[73] for instance, one of the parties argued with reference to the *Hollman* case that a right to share in the profit of a township development scheme constitutes a real right because the financial value of the dominant tenement is increased as a result of this right. However, in *Lorentz*, Nestadt J rejected this argument stating that it does not follow from the paragraph referred to in the *Hollman* case that the right in question is real because the financial value of the dominant tenement is increased.[74] Despite the criticism against the *Hollman* case, it does not follow that a right to restrain trade on another parcel of land cannot be established in the form of a praedial servitude. The crucial question that should be determined at all times before recognising a negative praedial servitude of restraint of trade is that the *utilitas* requirement must be complied with and the mere increase in the financial value of the dominant tenement cannot, on its own, serve as a criterion for the establishment of a praedial servitude pertaining to trading rights.[75] Even though Van der Merwe and De Waal are of the view that this decision should not be followed because it was *obiter*, hesitant and based on inconclusive authority,[76] the importance of the *Hollman* case is that the court emphasised its principled acceptance of two forms of praedial servitudes, namely a servitude to trade on the servient tenement and a servitude of restraint of trade.[77]

Interestingly, the following case is an example of circumstances where a praedial servitude should have been acknowledged by the court because two tenements were involved and the dominant tenement was specifically developed and appointed to benefit from the servitudal condition for an extended period of time. However, the court failed to recognise the existence of a praedial servitude. If the court had discussed and applied the *utilitas* requirement to the facts, the court arguably would have reached a different result, confirming the existence of a praedial servitude.

---

[73] 1978 (3) SA 1044 (T) 1049. De Waal cites Nestadt J's formulation of the *utilitas* requirement in the *Lorentz* case. "It is of the essence of a praedial servitude that it burdens the land to which it relates and that it provides some permanent advantage to the dominant land [as distinct from serving the personal benefit of the owner thereof]". See MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 195 footnote 541.

[74] *Lorentz v Melle* 1978 (3) SA 1044 (T) 1052.

[75] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 195.

[76] CG van der Merwe "Die nutsvereiste by erfdiensbaarhede" in DJ Joubert (ed) *Petere Fontes: LC Steyn gedenkbundel* (1980) 163 173-174; MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 193-195.

[77] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 193.

*Ex parte Steinberg and Others*,[78] is instructive because the court would have been willing to regard a servitude as praedial if it was clear from the intention of the parties to the agreement that the hotel premises served as the dominant tenement without taking into consideration whether the *utilitas* requirement has in actual fact been complied with.[79] In *Ex parte Steinberg and Others*,[80] the sellers sold lots in a township on the condition that no buyer of any lot or lots would be allowed to carry on the business or trade of a hotel, club, or deal in liquors either wholesale or retail on the particular property, without the consent in writing of the sellers.[81] The sellers had died and an application was made by the applicants, who were holders of a certain lot in the township, for leave to remove this condition from their title deeds.[82] The court considered the intention of the parties to the initial agreement. It appeared that the intention of the parties was to create a personal servitude in favour of the initial seller. The condition did not constitute a servitude for the benefit of any tenement. The servitude was of a personal nature, as it favoured the sellers in their personal capacities. Furthermore, the judge concluded that he is unable to identify any dominant tenement in the circumstances to which he can point as having been a tenement in favour of which a servitude could be said to have been operative.[83] An order was granted in terms of which the condition should be removed from the title deeds of the applicant because the personal servitude terminated upon the death of the beneficiary.[84] What is interesting about this decision is the fact that the court was willing to regard the right as a praedial servitude if it was clear from the intention of the parties to the agreement that the hotel premises would serve as a dominant tenement.[85] It

[78] 1940 CPD 1.
[79] MJ de Waal "Die moderne aanwending van grondserwitute: Eiendomsreg en die beheer oor die ontwikkeling van ander saaklike regte" 1995 *Tydskrif vir die Suid-Afrikaanse reg* 193 210-211; MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch (1989) 187.
[80] 1940 CPD 1.
[81] *Ex parte Steinberg and Others* 1940 CPD 1 4; MJ de Waal "Die moderne aanwending van grondserwitute: Eiendomsreg en die beheer oor die ontwikkeling van ander saaklike regte" 1995 *Tydskrif vir die Suid-Afrikaanse Reg* 193 210-211; MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 186.
[82] *Ex parte Steinberg and Others* 1940 CPD 1 4; MJ de Waal "Die moderne aanwending van grondserwitute: Eiendomsreg en die beheer oor die ontwikkeling van ander saaklike regte" 1995 *Tydskrif vir die Suid-Afrikaanse Reg* 193 210-211; MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 187.
[83] *Ex parte Steinberg and Others* 1940 CPD 1 5; MJ de Waal "Die moderne aanwending van grondserwitute: Eiendomsreg en die beheer oor die ontwikkeling van ander saaklike regte" 1995 *Tydskrif vir die Suid-Afrikaanse Reg* 193 210-211; MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 187.
[84] *Ex parte Steinberg and Others* 1940 CPD 1 6.
[85] MJ de Waal "Die moderne aanwending van grondserwitute: Eiendomsreg en die beheer oor die ontwikkeling van ander saaklike regte" 1995 *Tydskrif vir die Suid-Afrikaanse Reg* 193 210-211; MJ de

appears as if a praedial servitude would then have been construed in this case. However, once again the court did not mention, or purport to take into consideration, whether the existence of such a praedial servitude would have been in compliance with the *utilitas* requirement. In this case the hotel premises should have been established as the dominant tenement because the dominant tenement was created for a specific trading activity, namely for the purpose of conducting a hotel business.

The facts in *Ex parte Steinberg* are more or less similar to *Jonordon Investment (Pty) Ltd v De Aar Drankwinkel (Edms) Bpk and Others*[86] and *Hotel De Aar v Jonordon Investment (Edms) Bpk*[87] as it relates to the same historical context in De Aar. In addition, the agreements in restraint of trade that were in dispute are exactly the same. The only difference is that the *Ex parte Steinberg* case was decided in 1940 and was incorrect as mentioned, whereas the *Hotel De Aar v Jonordon Investment (Edms) Bpk* was decided in 1972 by means of adopting and applying a correct approach. The following section will discuss cases such as *Hotel De Aar v Jonordon Investment (Edms) Bpk* and *Bedford Square Properties (Pty) Ltd v Erf 179 Bedfordview (Pty) Ltd*[88] that serve as clear, persuasive authority for the establishment of a negative praedial trading servitude.[89]

### 5 2 3 Case law correctly illustrating a negative praedial servitude in restraint of trade

In *Jonordon Investment (Pty) Ltd v De Aar Drankwinkel (Edms) Bpk and Others*[90] the court once again had to decide whether a right to prevent another from selling liquor on properties in a township constituted a personal or a praedial servitude. The history pertaining to the existence of the restraint of trade clause in this case is important. Before 1911 all sales and transfers of lots in the Friedlander Township were subjected to a condition that restrained a purchaser or any other subsequent owner of the lot from carrying on the business or trade of an hotel or club or from dealing in spirituous

Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 187.

[86] 1969 (2) SA 117 (C).

[87] 1972 (2) SA 400 (A).

[88] 2011 (5) SA 206 (SCA).

[89] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 187-192; AJ van der Walt *The law of servitudes* (2016) 145; AJ van der Walt "*Novel servitudes Liber Amicorum – Essays in honour of JC Sonnekus Sakereg*" 2017 *Tydskrif vir die Suid-Afrikaanse Reg* 408 414.

[90] 1969 (2) SA 117 (C).

liquors, either on a wholesale or a retail basis, on the lot without the consent in writing of the sellers.[91] The motive for the insertion of such conditions was to protect the liquor trading interests of Hotel De Aar that was owned by the Friedlander Brothers and to guarantee them a virtual monopoly.[92] The Friedlander brothers owned the property until it was sold and transferred to Emil Reinhold Kluge in June 1911.[93] At that point the hotel had been the only licensed premises within the Municipality.[94]

The applicant negotiated to purchase land that was subject to the restraint of trade clause.[95] The applicant sought to acquire this property to enable him to erect a lounge bar and bottle store and to carry on the business of trading in liquor upon both an on-consumption and off-consumption basis.[96] In this respect, the applicant argued that if the restraint of trade condition remains operative, the applicant would be precluded from lawfully trading in liquor on the specific portion of land.[97] Therefore, the applicant sought an order authorising the omission of the specific condition from the deed of transfer conveying the specific erf to the applicant and directing the Registrar of Deeds, to register the transfer of the property free of this condition.

The applicant requested the deletion of the disputed condition and argued that it constituted a personal servitude in favour of the Friedlander Brothers and/or Kluge and that the servitude terminated upon the death of these parties.[98] The fourth respondent contended that the disputed condition pertaining to the land upon which his hotel is situated constitutes a praedial servitude in favour of the land on which the hotel was situated and that it therefore did not terminate upon the death(s) of the Friedlanders and/or Kluge.[99]

---

[91] *Jonordon Investment (Pty) Ltd v De Aar Drankwinkel (Edms) Bpk and Others* 1969 (2) SA 117 (C) 121.
[92] *Jonordon Investment (Pty) Ltd v De Aar Drankwinkel (Edms) Bpk and Others* 1969 (2) SA 117 (C) 120.
[93] *Jonordon Investment (Pty) Ltd v De Aar Drankwinkel (Edms) Bpk and Others* 1969 (2) SA 117 (C) 120.
[94] *Jonordon Investment (Pty) Ltd v De Aar Drankwinkel (Edms) Bpk and Others* 1969 (2) SA 117 (C) 120.
[95] *Jonordon Investment (Pty) Ltd v De Aar Drankwinkel (Edms) Bpk and Others* 1969 (2) SA 117 (C) 119.
[96] *Jonordon Investment (Pty) Ltd v De Aar Drankwinkel (Edms) Bpk and Others* 1969 (2) SA 117 (C) 119.
[97] *Jonordon Investment (Pty) Ltd v De Aar Drankwinkel (Edms) Bpk and Others* 1969 (2) SA 117 (C) 119.
[98] *Jonordon Investment (Pty) Ltd v De Aar Drankwinkel (Edms) Bpk and Others* 1969 (2) SA 117 (C) 122.
[99] *Jonordon Investment (Pty) Ltd v De Aar Drankwinkel (Edms) Bpk and Others* 1969 (2) SA 117 (C) 122.

The legal issues that had to be addressed was whether the condition created a praedial or personal servitude. The court held that the condition in dispute imposed upon the transferee of the land a burden that prohibited the transferee from exercising one of its normal rights of ownership to carry on the trade or business of a hotel or club or to deal in wine or spirituous liquor.[100] Therefore, the property was limited for specified uses. Furthermore, the condition provided that this restraint should be binding upon subsequent owners of the land as well. On this basis, it was argued that a servitude was clearly created. The court held that it was difficult to determine who the beneficiary of the disputed condition was. The court considered the surrounding circumstances and found that it undoubtedly leads to the conclusion that the restrictions contained in the disputed condition were imposed for the benefit of Kluge (as the successor in title to the Friedlander Brothers). Moreover, the evidence showed that prior to 1911, the Friedlander Brothers, who were the then owners of Hotel De Aar enjoyed a virtual monopoly in the hotel industry and in the wholesale and retail sale of liquor within the Municipality. This monopoly had been created and promoted by the burden of restrictive conditions in the title of land. It is clear from the conditions of sale that when the Friedlander Brothers sold the hotel to Kluge that it was the intention of the parties to the transaction that Kluge should acquire and continue to enjoy the monopoly. Therefore, the court held that it can be inferred that the condition was a personal servitude. The respondent in turn argued that the disputed condition constituted a praedial servitude[101] and relied upon *Tonkin v Van Heerden*[102] and *Venter v Minister of Railways*.[103] In the present case, the condition was neutral as it could constitute either a personal or a praedial servitude but it gave no indication as to which was intended. The judge stated that when it is uncertain whether a burden of a servitudal nature placed on land was intended to be for the benefit of another property or for the benefit of a particular person, the latter interpretation must be adopted, since it places the lesser burden upon the land that is subject to the servitude.[104] Thus, the court concluded that the disputed condition was intended to constitute a personal servitude in favour of Kluge, which was terminated upon the death of the beneficiary.

---

[100] *Jonordon Investment (Pty) Ltd v De Aar Drankwinkel (Edms) Bpk and Others* 1969 (2) SA 117 (C) 123.
[101] *Jonordon Investment (Pty) Ltd v De Aar Drankwinkel (Edms) Bpk and Others* 1969 (2) SA 117 (C) 125.
[102] 1935 NPD 589.
[103] 1949 (2) SA 178 (EC).
[104] 1969 (2) SA 117 (C) 126.

It is clear that Corbett J did not determine the fundamental question as to whether a restraint of trade could in fact be construed within the content of a praedial servitude.[105] He merely stated that for a servitude to be praedial, it should be imposed for the benefit of the dominant tenement, therefore mentioning the consequences of the right rather than the establishment requirements.[106] In addition, he stated that the disputed condition could only benefit the land on which the hotel was situated for as long as the hotel and liquor business continued to be situated on the land.[107] De Waal interprets Corbett J's statement as implying that a praedial servitude can only be established if the dominant tenement is developed for a specific trade or industry.[108] He also asserts that this would be the first time that South African courts have acknowledged (even if only by implication) that a negative praedial servitude in restraint of trade could be established, provided that the dominant tenement is developed and appointed for a specific trade or industry.[109] De Waal is of the opinion that the factual scenario in this particular case is a typical example of where there was indeed compliance with the *utilitas* requirement.[110] However, he doubts whether the *utilitas* requirement would be complied with if a liquor store was situated on the dominant tenement. In this regard, it is difficult to think of how prohibiting liquor trade on the servient tenement could benefit the dominant tenement. It is more likely, that it will benefit the personal interests of the business owner against competition. It is important that strict boundaries should be set, namely that praedial servitudes should only be used as a mechanism to protect the dominant tenement from harmful competition if the dominant tenement has been developed for a specific trade or industry that will benefit not only the current dominant tenement owner but her successors as well.

The owner of the Hotel De Aar appealed against the court a *quo*'s judgment. In *Hotel De Aar v Jonordon Investment (Edms) Bpk*[111] it was confirmed by the Appellate Division that the nature of the trade servitude in the particular case will depend on the

---

[105] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 188.
[106] 1969 (2) SA 117 (C) 125.
[107] 1969 (2) SA 117 (C) 125.
[108] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 189.
[109] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 183.
[110] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 183.
[111] 1972 (2) SA 400 (A).

intention of the parties when they entered into the agreement.[112] Contrary to the decision of the court a *quo*, the Appellate Division held that the intention of the parties was to establish a praedial servitude. It was not deemed necessary to explicitly address the question whether such a limitation could be construed as a praedial servitude especially with regard to the establishment requirements for praedial servitudes. Interestingly, however, the decision indirectly emphasised the fact that a negative praedial trading servitude can be created and the *utilitas* requirement satisfied. In this regard, the *utilitas* requirement is satisfied when the dominant land is specifically developed and appointed for a use (eg as a hotel business) that benefits from the servitude. As mentioned in the previous sections, this requirement was specifically missing in *Tonkin* and *Venter*, potentially making it impossible to recognise the particular negative trading rights that were created in those cases. The *Hotel De Aar* appeal case is different in the sense that it is conceivable that the right created was in the nature of the praedial servitude.

In this regard, the most important aspect of Van Blerk JA's judgment on appeal is the argument[113] that an essential characteristic of a praedial servitude is that it should always benefit the owner of the dominant tenement as well as his successors in title.[114] It was obvious in this case that the parties had the intention to create a praedial servitude in favour of the hotel premises.[115] This right was specifically created to ensure that the hotel would be the sole traders of alcohol in the neighbourhood. This measure was established to create business certainty and the intention was that it would attach to the land as a praedial servitude.[116] It was not explicitly established in this case whether it is relevant for the dominant tenement to be created for a specific trade or business. Arguably, this ought to have been the crucial decisive factor. If the parties intended for a praedial servitude to be established, it would have guaranteed

[112] *Hotel De Aar v Jonordon Investment (Edms) Bpk* 1972 (2) SA 400 (A); MJ de Waal "Die moderne aanwending van grondserwitute: Eiendomsreg en die beheer oor die ontwikkeling van ander saaklike regte" 1995 *Tydskrif vir die Suid-Afrikaanse Reg* 193 212; MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 187-190.
[113] MJ de Waal "Die moderne aanwending van grondserwitute: Eiendomsreg en die beheer oor die ontwikkeling van ander saaklike regte" 1995 *Tydskrif vir die Suid-Afrikaanse Reg* 193 212-213.
[114] *Hotel De Aar v Jonordon Investment (Edms) Bpk* 1972 (2) SA 400 (A) 405; MJ de Waal "Die moderne aanwending van grondserwitute: Eiendomsreg en die beheer oor die ontwikkeling van ander saaklike regte" 1995 *Tydskrif vir die Suid-Afrikaanse Reg* 193 213; MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 187-190.
[115] *Hotel De Aar v Jonordon Investment (Edms) Bpk* 1972 (2) SA 400 (A) 405; MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 189-190.
[116] MJ de Waal "Die moderne aanwending van grondserwitute: Eiendomsreg en die beheer oor die ontwikkeling van ander saaklike regte" 1995 *Tydskrif vir die Suid-Afrikaanse Reg* 193 213.

that each successor in title of the dominant tenement will also enjoy the benefit of business certainty. If the intention is not clear, the benefit of the servitude will be determined by the usage of the dominant tenement. In such a case a personal servitude, or even a personal right created by way of contractual agreement, would be the designated avenue for the creation of the right.

The following case that will be discussed is *Bedford Square Properties (Pty) Ltd v Erf 179 Bedfordview (Pty) Ltd*,[117] where the court correctly concluded that a negative praedial trading servitude was created. In *Bedford Square Properties*, the appellant sought an order declaring the enforcement of two servitudes of restraint of trade to be contrary to public policy and effecting cancellation of the servitude. The notarial deed of servitude prohibited the owner of the appellant's two properties (the servient properties) from letting rental space on the properties, for a period of eleven years as from 4 November 2003, to Woolworths or Mica Hardware.[118] The servitudes were clearly not intended to be personal servitudes because they were specifically created for the advantage of the two dominant tenements. Furthermore, it was held that the dominant and servient tenements are close enough together to satisfy the requirements of *vicinitas*.[119] Having accepted that a servitude may become invalid because it was created and continues to be against public policy, it had to be considered whether the guidelines that were developed to determine whether or not a contractual agreement in restraint of trade was invalid, could, without more, be used to determine if a servitude in restraint of trade is invalid.[120] Based on the authority of *Venter v Minister of Railways*[121] it was decided that the rules pertaining to contracts in restraint of trade do not apply to praedial servitudes because they restrict the use of property as opposed to the activity of a particular person. The court compared the facts of the *Venter* case to the present case and held that the restraint in the present case did not prevent the appellant from entering into lease agreements with Woolworths or with Mica in respect of any property within the city and that it only affected the use of the servient properties. If an owner sold a property subject to a restraint in favour of another property, the purchaser bought and paid for less than full ownership. Thus, it

[117] 2011 (5) SA 206 (SCA).
[118] *Bedford Square Properties (Pty) Ltd v Erf 179 Bedfordview (Pty) Ltd* 2011 (5) SA 306 (SCA) 1; CG van der Merwe & JM Pienaar "The law of property" 2011 *Annual Survey of South African Law* 973-975.
[119] *Bedford Square Properties (Pty) Ltd v Erf 179 Bedfordview (Pty) Ltd* 2011 (5) SA 306 (SCA) 4.
[120] *Bedford Square Properties (Pty) Ltd v Erf 179 Bedfordview (Pty) Ltd* 2011 (5) SA 306 (SCA) 10; CG Van der Merwe & JM Pienaar "The law of property" 2011 *Annual Survey of South African Law* 973-975.
[121] 1949 (2) SA 178 (E) 185.

would be unjustifiable to permit the purchaser to escape the consequences of his or her agreement. The servitudes were regarded as valid by the court because the object of the servitude was to create a trading advantage for the dominant tenements. Therefore, this case shows that it is possible for a restraint of trade agreement to be constituted as a negative praedial trading servitude.

From the discussion of the case law in this section it is clear that authority exists which recognises a negative praedial trading servitude.[122] The more recent judgments in *Hotel De Aar v Jonordon Investment (Edms) Bpk*[123] and *Bedford Square Properties (Pty) Ltd v Erf 179 Bedfordview*[124] support De Waal's argument that restrictions on trade (negative praedial trading servitudes) that serve the lasting benefit of every successive owner of the dominant land and that satisfy the *utilitas* requirement can be recognised as praedial servitudes.[125] However, the court did not mention the *utilitas* requirement explicitly when the Supreme Court of Appeal held that the servitudes were valid due to the fact that the object of the servitude in these cases was to create a trading advantage for the dominant tenement. Therefore, it is important that when South African courts deal with an issue in dispute as to whether an agreement in restraint of trade might take the form of a praedial servitude, they should implement a strict approach to determine whether the *utilitas* requirement has been complied with in order to prevent a proliferation of unnecessary burdens on land.

### 5 2 4 Circumstances under which a restraint of trade clause should be registered as a praedial servitude

The question that part 5 2 aimed to address, through case law, is whether an owner of land can be prohibited from trading on her own land to protect the owner of the dominant tenement from harmful competition. Another question that emerges after having discussed South African case law is whether praedial servitudes should be used as a mechanism to curb freedom of trade? Neither the *Tonkin*, *Venter* nor the *Hollman* judgments grappled with any of these questions, nor do these cases provide

[122] *Tonkin v Van Heerden* 1935 NPD 589; *Venter v Minister of Railways* 1949 (2) SA 178 (EC).
[123] 1972 (2) SA 400 (A).
[124] 2011 (5) SA 206 (SCA). See also AJ van der Walt *The law of servitudes* (2016) 444.
[125] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 206; AJ van der Walt "*Novel servitudes Liber Amicorum – Essays in honour of JC Sonnekus Sakereg*" 2017 *Tydskrif vir die Suid-Afrikaanse Reg* 408 414.

a detailed discussion relating to the circumstances in which a negative servitude of restraint of trade can be established.[126] Another matter of concern is that none of the courts considered any policy concerns for the recognition of negative praedial servitudes in restraint of trade. These concerns may include: Firstly, the fact that such agreements potentially create threats to the public good as it has the potential of disrupting efficient markets.[127] This will happen when future owners are prevented from using the parcel of land to its full potential.[128] Noncompetition agreements can also lead to the purchasing of monopolies because even if it was not the intention of the contracting owner of the servient tenement to use the land to compete with the dominant tenement, the land will be burdened for all future prospective owners to infinity even if the subsequent purchaser knows what they are letting themselves in for.[129] It also violates the principle of fair competition in the market place.[130] The servient tenements, which are burdened with such a form of servitudes, are indefinitely removed from a particular trade to the detriment of free market competition.[131] To address and eliminate these policy concerns, the following suggestions will highlight the specific circumstances under which servitudes in restraint of trade should arguably be acknowledged as a praedial servitude.

Firstly, the restraint of trade agreement should have the effect of subtracting from the *dominium* of the owner of the servient tenement.[132] Secondly, all the establishment requirements for the creation of a praedial servitude should be met. In both the judgments of *Tonkin* and *Venter*, the judges simply assumed as a general point of departure that the *utilitas* requirement have been met. The *Hotel De Aar* and *Bedford* cases, in turn correctly illustrate compliance with the *utilitas* requirement, although no mention was made to that effect. De Waal's criticism relating to the *Tonkin*, *Venter* and *Hollman* judgments is that the *utilitas* requirement cannot be regarded as being complied with merely because it protects a business on the dominant tenement against

[126] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 193.
[127] A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209 1239-1240.
[128] A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209 1240.
[129] A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209 1240.
[130] A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209 1240.
[131] A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209 1241.
[132] See chapter 2.

competition.[133] Such an interpretation of the *utilitas* requirement would open a floodgate of unnecessary burdens on land as it would encourage the creation of trading monopolies that will have the effect of benefiting the personal interests of the business owner instead of the dominant tenement. Even though the *Hotel De Aar* and *Bedford* cases serve as examples of instances where the *utilitas* requirement have been met, the courts failed to mention explicitly that it is vital to establish that the dominant owner's right to prevent trade on the servient land should be *closely* related to the use and enjoyment of the dominant tenement. In other words, according to the dominant tenement's actual development, appointment and use for a specific purpose.[134] The dominant tenement should be developed for a specific trade such as a theatre, oil refinery, restaurant, petrol station or a factory that requires a unique construction of structures on land. If the dominant tenement is used for a general office building for physicians, accountants or attorneys, a clause prohibiting the use of a neighbouring building for similar commercial purposes would once again not create a praedial servitude.[135] This is because the building on the dominant tenement is not developed and appointed for a specified commercial or industrial use.[136] There should be a reasonably close and *direct* link between the burden imposed on the servient tenement, the content of the servitude and the benefit that it holds for the use of the dominant tenement. In this regard, the strict application of the *utilitas* requirement will ensure that the actual dominant tenement benefits from the servitudal agreement and not the personal interests and delight of the owner of the dominant tenement. It is only under such aforementioned circumstances that courts should allow the creation of a negative praedial trading servitude in restraint of trade. If a restraint of trade clause does not comply with the aforementioned conditions for the creation of a praedial

[133] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 194.
[134] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 207.
[135] AN Yiannopoulous *Louisiana civil law treatise: Praedial servitudes* vol 4 (2015) §6.5.
[136] In Germany negative praedial servitudes of restraint of trade are recognised, provided that the agreements serve the permanent destination of the dominant tenement. Therefore, the praedial servitude must increase the utility that use and exploitation of the dominant tenement provides on a reasonably durable basis for everyone who uses the land in accordance with its natural or acquired condition. See BGH 24 September 1982, V ZR 96/81, NJW 1983 S 115 (116); *Staudinger/Wiegand BGB Neubearbeitung* 2017 § 1018 Rn 108; *Münchener Kommentar/Joost* 7 Auflage (2017) § 1018 Rn 32; *Schulze/Ansgar Staudinger* 9 Auflage (2017) § 1018 Rn 4. See also AN Yiannopoulous *Louisiana civil law treatise: Praedial servitudes* vol 4 (2015) §6.5.

servitude, it should rather be registered as a personal servitude or categorised as a personal right.[137]

To substantiate the creation of praedial servitudes in restraint of trade, numerous comparative authority exists that authorises servitudes in restraint of trade such as English,[138] Scots[139] and Dutch law.[140] The subsequent section will discuss Louisiana's approach to restraint of trade agreements. The reason for providing a more extensive discussion of Louisiana law as a comparative jurisdiction is due to the similarities it shares with South African law in that both legal systems have Roman roots and both jurisdictions are mixed legal systems.[141] However, it should be noted that Louisiana is a codified mixed legal system whereas South African law is uncodified.[142] Another difference between the two jurisdictions is that the Louisiana Civil Code is heavily influenced by medieval French law, whereas South African law is greatly influenced by Germanic law as it was received in the Netherlands during the eighteenth and

[137] See parts 5 4; 5 5 below and chapter 6 that will discuss alternative mechanisms to structure restraint of trade agreements.

[138] For example, English law authorises servitudes in restraint of trade as restrictive covenants in land. In English law, a restrictive covenant will have proprietary effect if the covenant is restrictive of land use; if it relates to an identifiable dominant tenement; if it benefits or accommodates the dominant tenement; and most importantly, if the covenant has been intended to run with the covenantor's land. See *Tulk v Moxhay* (1848) 2 Ph 774, 41 ER 1143; C Harpum, S Bridge & M Dixon *Megarry & Wade The law of real property* 7 ed (2008) para 32-055; K Gray & SF Gray *Elements of land law* 5 ed (2009) paras 4 16-3 4 19; AJ van der Walt *The law of servitudes* (2016) 61, 150. Real covenants in English law will be discussed in chapter 6 part 6 3.

[139] Servitudes in restraint of trade are also possible in Scots law in the form of real burdens that serve the dominant tenement. See *Russel Properties (Europe) Ltd v Dundas Heritable Ltd* (2012) CSOH 175; *Hill of Rubislaw (Q Seven) Ltd v Rubislaw Quarry Aberdeen Ltd* (2014) CSIH 105; KCG Reid, GL Gretton & AR Barr *Conveyancing 2014* (2015) 117-124. See also AJ van der Walt *The law of servitudes* (2016) 149.

[140] Dutch law also authorises servitudes in restraint of trade in the form of a qualitative obligation. See Article 6:252 of the *Burgerlijke Wetboek*; B Akkermans & W Swadling "Types of property rights – immovable and movables (goods)" in S van Erp & B Akkermans (eds) *Cases, materials and text on property law* (2012) 211-364 294; AHT Heisterkamp "Beperkte regten op goederen" in WHM Reehuis & AHT Heisterkamp with GE van Maanen & GT de Jong (eds) *Pitlo Het Nederlands burgerlijk recht* part 3 *Goederenrecht* 13 ed (2012) 437-514 456. See also AJ van der Walt *The law of servitudes* (2016) 148. In Dutch law, no *utilitas* requirement exists for qualitative obligations because the existence of a dominant tenement is not a prerequisite and therefore it is no longer appropriate to insist on an *utilitas* requirement for servitudes either. The *utilitas* requirement has been left out of the 1992 *Burgerlijke Wetboek*. Article 5:70 of the *Burgerlijke Wetboek* stipulates that some utility connection is required in that the requirement will be complied with if the beneficiary regards the servitude as useful or beneficial due to the fact that it increases or improves the beneficiary's use of the dominant tenement. See further AHT Heisterkamp "Beperkte regten op goederen" in WHM Reehuis & AHT Heisterkamp with GE van Maanen & GT de Jong (eds) *Pitlo Het Nederlands burgerlijk recht* part 3 *Goederenrecht* 13 ed (2012) 437-514 453; EB Rank-Berenschot "Beperkte genotsrechten" in HJ Snijders & EB Rank-Berenshot (eds) *Goederenrecht* 5 ed (2010) 509-572 531 (para 637). See also AJ van der Walt *The law of servitudes* (2016) 147-148.

[141] CG van der Merwe "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363.

[142] CG van der Merwe "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363 1365.

nineteenth centuries.[143] In light of the fact that this chapter seeks to determine the circumstances under which the right to prevent another from trading on their own land can be constituted as a praedial servitude, Louisiana law provides valuable insights due to the fact that Louisiana's Civil Code specifically authorises the recognition of negative praedial trading servitudes in restraint of trade.[144] Furthermore, even though Louisiana recognises praedial servitudes in principle, it is also extremely hesitant to recognise land encumbrances as it has strict policy reasons in place not to burden land unnecessarily, similar to South Africa. However, despite the existence of policy reasons not to burden land superfluously, Louisiana's jurisprudence is similar to South African jurisprudence such as the *Tonkin* and *Venter* cases, where courts have a tendency to recognise restraint of trade clauses in the form of praedial servitudes without properly scrutinising whether there is actual compliance with the *utilitas* requirement. Louisiana's legal system is also taken into consideration because effective solutions are proposed as to how various issues pertaining to negative praedial servitudes in restraint of trade can be solved that will have the effect of balancing the interests of businesses as well as the public interest, thereby reducing public concerns.

## 5 3 Restraint of trade agreements in Louisiana law

### 5 3 1 Introduction

The vast majority of states in the United States of America recognise and regulate noncompetition agreements in order to balance the needs of businesses with the needs of the public.[145] These noncompetition agreements can take the form of a direct

[143] CG van der Merwe "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363 1365.
[144] Article 706 of the Louisiana Civil Code (1977).
[145] § 23:921 Louisiana Revised Statute (2017). In Louisiana, restraint of trade clause are generally null and void except as provided for in the specific section. For example, a person or company who sells the goodwill of a business may negotiate with the purchaser that the seller will refrain from engaging in a business similar to the business being sold within a specified parish or parishes as long as the purchaser deriving title to the goodwill carries on a similar business, not to exceed a period of two years from the date of sale. § 28-2-703; 28-2-704; 28-2-705 Montana Code Annotated (2017): In Montana, contracts in restraint of trade are generally void except in circumstances where a person who sells the goodwill of a business agrees with the buyer to refrain from carrying on a similar business within the areas provided in the relevant provisions of the statute and as long as the buyer or individual deriving title to the goodwill from the buyer carries on a similar business in a specific area as set out in the statutory provisions. § 15.50 Texas Business and Commerce Code Annotation (West 2015): Covenants not to compete are enforceable to the extent that it entrenches limitations as to time, geographical area, and scope of

approach, by restraining a person from participating in commerce, or it can take the form of an indirect approach, by restraining the use of land for commercial purposes.[146] Restraining the use of land for commercial purposes often arises in lease agreements[147] or sale agreements of land. In many states the contravention of these agreements may give rise to legal action against the owner who entered into the agreement and also the lessees or purchasers of the burdened property.[148] In Louisiana, noncompetition agreements should technically not be easily enforceable against third parties given Louisiana's legislative framework which draws a clear distinction between real and personal rights[149] and their corresponding obligations into two, separate categories.[150] However, similar to South Africa's earlier judgments, Louisiana's jurisprudential trend will illustrate once again the courts' willingness to acknowledge negative praedial trading servitudes without conducting a proper investigation to determine whether restraint of trade agreements in actual fact comply with the requirements for the establishment of praedial servitudes. The subsequent section will provide a detailed analysis regarding Louisiana's legislative framework as well as the courts' approach to these types of agreements in restraint of trade.

### 5 3 2 Restraint of trade agreements as praedial servitudes

#### *5 3 2 1 Louisiana's legislative framework*

Similar to South African law, praedial servitudes place a burden on the servient tenement for the benefit of the dominant tenement in Louisiana law.[151] In this regard,

activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interests of the promisee. See also A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209.

[146] A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 Louisiana *Law Review* 1209 1209-1210.

[147] See chapter 6.

[148] A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 Louisiana *Law Review* 1209 1209-1210.

[149] A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209 1210. See *Winn-Dixie Stores Inc. v Dolgencorp LLC* 746 F 3d 1008 (11 Cir 2014) which is discussed in Chapter 6.

[150] §1763, §1764, §1765, §1766 of the Louisiana Civil Code (1977). See also *Winn-Dixie Stores Inc v Dolgencorp LLC* 746 F 3d 1008 (11 Cir 2014) 1026, 1031: Winn Dixie sued to enforce lease agreements prohibiting competition in various states. The contracts were enforceable against its lessors in Florida. However, restrictive covenants embedded in lease agreements were not enforceable against third parties in Louisiana since Louisiana draws a clear distinction between real and personal rights.

[151] Article 646 of the Louisiana Civil Code (1977). See also JA Lovett, MG Puder & EL Wilson *Louisiana property law, The civil code, Cases and commentary* (2014) 653-654; A Hotard "Real rights of

praedial servitudes consist of three elements, namely that there should be two separately owned estates,[152] a burden should exist in respect of the servient tenement, and it must be for the benefit of the dominant tenement.[153] Neither contiguity, nor (close) proximity of the two tenements is specifically required for the existence of a praedial servitude, provided that the two tenements are located in such a manner as to allow one tenement to derive some form of benefit from the servient land.[154] Article 706 of the Louisiana Civil Code stipulates that praedial servitudes could be either affirmative or negative.[155] Article 706 defines negative servitudes as servitudes that impose on the owner of the servient tenement, the duty to refrain from doing something on his estate. Furthermore, it states that such servitudes include the prohibition of building and of the use of land for a commercial or industrial establishment. It is clear from article 706 of the Louisiana Civil Code that it is possible to create negative rights in restraint of trade in the form of praedial servitudes. In Louisiana agreements not to compete have no visible sign of its existence and is therefore referred to as "non-apparent".[156] As a result of the invisibility of servitudes in restraint of trade it may only be acquired by title deed and that title should be recorded in order for it to be binding on third parties.[157] A recording of a title document will help third parties to become aware of the existence of the servitude in restraint of trade.[158] In other words, similar to South African law, these types of agreements must be registered.[159]

---

noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209 1214.

[152] Article 646 of the Louisiana Civil Code (1977). See JR Trahan *Louisiana law of property A Précis* (2012) 155-156, 160; JA Lovett, MG Puder & EL Wilson *Louisiana property law, The civil code, Cases and commentary* (2014) 653-654.

[153] Article 647 of the Louisiana Civil Code (1977). See JR Trahan *Louisiana law of property A Précis* (2012) 158; JA Lovett, MG Puder & EL Wilson *Louisiana property law, The civil code, Cases and commentary* (2014) 654.

[154] Article 648 of the Louisiana Civil Code (1977). See chapter 3 parts 3 2 2 5. In South African law, vicinity is also not treated as an independent requirement for the establishment of a praedial servitude but it is treated as an element of utility.

[155] Article 706 of the Louisiana Civil Code (1977). This article provides a definition of an affirmative and negative servitude. For purposes of this chapter, only the definition of a negative praedial servitude is necessary. See JA Lovett, MG Puder & EL Wilson *Louisiana property law, The civil code, Cases and commentary* (2014) 764.

[156] Article 707 of the Louisiana Civil Code (1977); JA Lovett, MG Puder & EL Wilson *Louisiana property law, The civil code, Cases and commentary* (2014) 763.

[157] AG McBride "The need for legislative authorization of noncompete servitudes in commercial leases" (2017) 61 *Loyola Law Review* 325 334.

[158] AG McBride "The need for legislative authorization of noncompete servitudes in commercial leases" (2017) 61 *Loyola Law Review* 325 333.

[159] See chapter 2.

However, it is also important to note that even though negative praedial servitudes in restraint of trade are permitted, Louisiana[160] has a presumption against the recognition of praedial servitudes and against burdens on land. For example, the Supreme Court of Louisiana has held that praedial servitudes in general are in 'derogation of public policy' and 'not entitled to be viewed with favor by the law'.[161] Direct bias against the recognition of praedial servitudes can also be found in articles 730 to 734 of the Louisiana Civil Code. The reason for this is that servitudes place burdens on the free disposal and use of land.[162] Louisiana's legislation also clearly provides that burdens on land in the form of praedial servitudes and restraint of trade agreements are not favoured in terms of the law.[163]

The default position in Louisiana is that restraint of trade agreements are not enforceable unless they fall within a category of defined exceptions.[164] The Louisiana Revised Statute §23:921[165] states that a contractual agreement restraining individuals from exercising a lawful profession, trade or business will be null and void except for the agreements as provided in the relevant statute.[166] Agreements that are categorised as exceptions are contracts regulating employment relationships, the sale of a company's goodwill, business partnerships and franchise. Except for franchise agreements, the other agreements are limited to a period of two years. Louisiana's legislation requires that courts should avoid enforcing praedial servitudes unless the law and facts of the particular case undoubtedly support the existence of a praedial servitude.[167] Therefore, courts should tread carefully when recognising a praedial servitude as valid by means of ensuring that all legal principles are complied with.

---

[160] South Africa also has presumptions against a praedial servitude. See *Jonordon Investment (Pty) Ltd v De Aar Drankwinkel (Edms) Bpk and Others* 1969 (2) SA 117 (C) 126. The court affirmed that when it is doubtful whether a burden placed on land was intended to be for the benefit of another property or for the benefit of a specific person, then the least burdensome interpretation should be adopted, namely a personal servitude, since it places the lesser burden upon the land that is subject to the servitude.

[161] *Palomeque v Prudhomme* 664 So 2d 88 93 (La 1995).

[162] *Palomeque v Prudhomme* 664 So 2d 88 93 (La 1995). See also A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209 1225.

[163] Louisiana Revised Statute §23:921 (2017). See also A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209 1225-1226.

[164] Louisiana Revised Statute §23:921 (2017). See also A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209 1227.

[165] (2017).

[166] Louisiana Revised Statute §23:921 (2017). See also A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209 1228.

[167] See A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209 1227.

The relevant provisions pertaining to restraint of trade agreements in the influential (not binding) *Restatement (Third) of Property: Servitudes*[168] should also be pointed out. § 3 2 declares that the touch-or-concern doctrine, equivalent to South Africa's *utilitas* requirement[169] is outdated.[170] This provision stipulates that neither the burden nor the benefit of a servitudal covenant is required to touch or concern the land to validate the covenant as a servitude. The *Restatement (Third) of Property: Servitudes* (2000) provides that § 3 1 and the rules stated in §§ 3 4 – 3 7 will determine whether a servitude is valid. § 3 1 of the *Restatement (Third) of Property: Servitudes* (2000) provides that a servitude is valid unless it is illegal, unconstitutional and if it violates public policy. §§ 3 1 and 3 6 in turn state that a servitude that imposes an unreasonable restraint on trade or competition will be declared invalid because it violates public policy.[171]

The rule in Louisiana is that the validity of servitudes in restraint of trade is to be determined by the common law standard of unreasonable restraints on trade and competition and under statutory antitrust and competition laws.[172] The common law standard of unreasonable restraints on competition focuses on the purpose, the geographic extent, and the duration of the restraint to determine whether it is

[168] Historically, three sets of rules developed to regulate the dispute in American law, namely the law of easements, the law of real covenants and the law of equitable servitudes. The *Restatement (Third) of Property (Servitudes)* (2000) aims to unify the three lines of doctrine. However, many courts still treat the three sets of rules separately. See JW Singer *Introduction to property* 2 ed (2005) 231. In American common law, real covenants and equitable servitudes do not run with the land unless it is proven that the covenant and servitude touch and concern the land. It appears from American literature and jurisprudence that the touch and concern requirement has been a source of confusion and that it has been the target of criticism. As a result, the American Law Institute introduced a legal framework in which the touch and concern requirement is eliminated. A legal framework entrenching a heavily influenced contractual regime was provided stating that a covenant will be regarded as running with the land unless it is 'illegal or unconstitutional or violates public policy'. See also Author Unknown "Touch and concern, the *Restatement (Third) of Property*: Servitudes and a proposal" (2009) 122 *Harvard Law Review* 938-959.

[169] See chapter 3 part 3 3 5.

[170] In English law, Davis asserts that it is arguable that the 'benefit and burden' doctrine (*utilitas* requirement in South African law, touch-or-concern requirement in American law) is reasonably clear in its application in that it promotes fairness and that far greater use should be made of it. Based on Davis assertions and Chapter 3's theoretical and practical discussion of the *utilitas* requirement it is difficult to comprehend why the Restatement would abandon the touch-or-concern doctrine. The aim of the touch-or-concern requirement is to serve as a partial hedge against the overburdening of land. For articles highlighting the importance of the 'benefit and burden' principle, see CJ Davis "The principle of benefit and burden" (1998) 57 *Cambridge Law Journal* 522 552 and C Bevan "The doctrine of benefit and burden: Reforming the law of covenants and the *numerus clausus* problem" (2018) 77 *Cambridge Law Journal* 1-22. See also B Ziff & K Jiang "Scorched earth: The use of restrictive covenants to stifle competition: (2012) 30 *Windsor Year Book of Access to Justice* 79 85.

[171] For more examples on servitudes that are invalid because they violate public policy, see § 3 1 of the *Restatement (Third) of Property: Servitudes:* (2000).

[172] JA Lovett, MG Puder & EL Wilson *Louisiana property law, The civil code, Cases and commentary* (2014) 765.

reasonable. Negative servitudes in restraint of trade that are directly linked to a particular parcel of land are rarely unreasonable because the impact will be limited to one piece of land. The owner is free to engage in a commercial activity in a different place. However, if the restricted land is the only land available in a market area for a particular use, the restriction will be regarded as unreasonable if it will indicate a monopoly or restrict competition in the relevant market.

Numerous courts in Louisiana have confronted the legal question of whether negative servitudes could (or should) be used as a mechanism to constrain particular commercial activities from being conducted on a servient tenement not for aesthetic purposes or to protect the dominant tenement owner from interference with her personal enjoyment of his land, but for the primary objective of benefiting a business situated on the dominant tenement.[173] The following section will explain Louisiana's judicial approach towards servitudes in restraint of trade briefly.

### *5 3 2 2 Louisiana's judicial approach*

The Supreme Court of Appeal in Louisiana has not yet dealt with a matter pertaining to a restraint of trade agreement in the form of a real right.[174] However, lower courts in Louisiana have enforced praedial servitudes in restraint of trade in matters relating to the sale of land or the sale of businesses on a regular basis.[175] Two judgments of the lower courts are instrumental with regard to the recognition of servitudes in restraint of trade.

In *R & K Bluebonnet Inc v Patout's of Baton Rouge Inc*[176] the co-owners of a ten acre portion of land decided to open a restaurant. Four acres of land were set aside

[173] JA Lovett, MG Puder & EL Wilson *Louisiana property law, The civil code, Cases and commentary* (2014) 764.

[174] The Louisiana Supreme Court has dealt with real rights of restraint of trade and the court held that restraint of trade clauses embedded in lease agreements could not create real rights because lease agreements place burdens on the lessors and not on the land belonging to the lessors. See *Leonard v Lavigne* 162 So 2d 343 (La 1964). See also A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209 1221.

[175] *R & K Bluebonnet Inc v Patout's of Baton Rouge Inc* 521 So 2d 634 635 (La Ct App 1988*); Meadowcrest Ctr v Tenet Health Sys Hosps Inc* 902 So 2d 512 514 (La Ct App 2005). See also A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209 1221.

[176] 521 So 2d 634 635 (La Ct App 1988). See discussion and analysis of case in JA Lovett "Title conditions restraint of trade" in VV Palmer & EC Reid (eds) *Mixed jurisdictions compared private law in Louisiana and Scotland Edinburgh Studies in Law Volume 6* (2006) 30 58; AG McBride "The need for

for them to build their new restaurant. The remainder of their land was sold. The co-owners included a restraint of trade clause in their contract of sale, which entailed that the land sold could not be used as a seafood restaurant for sixty months from the date of the sale. They negotiated that the agreement will act as a building restriction within the meaning of articles 775-783 of the Louisiana Civil Code[177] on the property sold. The new owner of the remaining property filed for bankruptcy and Mr Alex Patout leased the site and opened Patout's Restaurant. The plaintiffs sought legal action and alleged that Mr Patout was acting in violation of the building restriction that was contained in the original contract of sale due to the fact that half of his restaurant's menu consisted of seafood dishes. The court of first instance granted the plaintiffs the injunctive relief as requested by them which prohibited Mr Patout from operating a seafood restaurant and ordered the defendant to remove a number of seafood items from its menu. Mr Patout appealed and argued that the court of first instance erroneously found that the contract of sale consisted of an enforceable building restriction. The Louisiana Second Circuit Court of Appeal held that the trial court erred in finding that the language of the limitation on usage of the property was a building restriction within the meaning of articles 775-783 of the Louisiana Civil Code.[178] The plaintiffs argued that if the constraint is not a building restriction, then it should be categorised as a praedial servitude because a praedial servitude places a burden on the servient tenement for the benefit of a dominant tenement and the two tenements must belong to different owners.[179] In this regard, the Louisiana Second Circuit Court of Appeal held that the restriction was intended to operate in favour of the plaintiffs' property. As a result, the court held that the restriction has indeed complied with the requirements for the establishment of a praedial servitude and was therefore enforceable.[180]

---

legislative authorization of noncompete servitudes in commercial leases" (2017) 61 *Loyola Law Review* 325 347 and A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209 1222.

[177] Article 775 of the Louisiana Civil Code (1977) states that a building restriction in Louisiana law refers to a specified form of real right in the form of subdivision planning. It is burdens that are imposed by the owner of immovable property in pursuance of a general plan regulating building standards, specified uses and improvements. This plan should be feasible and capable of being preserved. Building restrictions cannot exist in the absence of a general plan of development that affects several estates together. See articles 776-783 of the Louisiana Civil Code (1977) which discusses the law pertaining to the establishment, nature, regulation, remedial relief, and termination etc. concerning building restrictions. See also A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209 1222 footnote 101.

[178] *R & K Bluebonnet Inc v Patout's of Baton Rouge Inc* 521 So 2d 634, 635 (La Ct App 1988).

[179] *R & K Bluebonnet Inc v Patout's of Baton Rouge Inc* 521 So 2d 634, 635 (La Ct App 1988).

[180] *R & K Bluebonnet Inc v Patout's of Baton Rouge Inc* 521 So 2d 634, 635 (La Ct App 1988).

The problem with the aforementioned case is that the court did not examine whether the restraint of trade *benefitted* the dominant tenement.[181] The court merely assumed that the *utilitas* requirement has been met. The court relied on article 731 of the Louisiana Civil Code and simply stated that *some* benefit had been created without explicitly elaborating on what the benefit actually entailed.[182] The following case will also illustrate Louisiana's jurisprudential trend of not engaging with the question of whether, and to what extent, a restraint of trade agreement benefits the dominant tenement.

In *Meadowcrest Center v Tenet Health System Hospitals Inc*[183] the respondents acquired a portion of land and built a hospital on it. The respondents sold the unused portion of land to Meadowcrest Center. The contract of sale consisted of a clause which prohibited Meadowcrest and their successors from using the property as 'an outpatient surgical center or a diagnostic center or any similar facility' without obtaining written consent from the respondents or its successors. Meadowcrest built a multi-tenant office building on the servient land and eventually leased a part of the office building for the operation of a MRI clinic. Meadowcrest sought declaratory relief to have the servitude set aside. The court regarded the arguments of Meadowcrest to set aside the negative praedial servitude in restraint of trade as a threat to the validity of article 706 of the Louisiana Civil Code, which explicitly authorises negative servitudes prohibiting commercial or industrial uses.[184] The court held that the agreement burdened the servient tenement as it obliged the owner to abstain from conducting specific activities on his own property. The court referred to this specific restriction as a negative praedial servitude in restraint of trade as contemplated in article 706 of the Louisiana Civil Code without discussing how the restraint of trade agreement benefitted the dominant tenement.[185]

---

[181] JA Lovett "Title conditions restraint of trade" in VV Palmer & EC Reid (eds) *Mixed jurisdictions compared private law in Louisiana and Scotland Edinburgh Studies in Law Volume 6* (2006) 30 58; A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209 1222.

[182] JA Lovett "Title conditions restraint of trade" in VV Palmer & EC Reid (eds) *Mixed jurisdictions compared private law in Louisiana and Scotland Edinburgh Studies in Law Volume 6* (2006) 30 58.

[183] 902 So 2d 512, 514 (La Ct App 2005).

[184] *Meadowcrest Center v Tenet Health System Hospitals Inc* 902 So 2d 512, 515 (La Ct App 2005). See also JA Lovett, MG Puder & EL Wilson *Louisiana property law, The civil code, Cases and commentary* (2014) 764 769.

[185] A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209 1223.

From the discussion of the abovementioned case law, it is clear that the courts in Louisiana failed to thoroughly examine and implement the essential elements of praedial servitudes in the context of restraint in trade agreements although they were indeed willing to recognise them.[186] The court also did not grapple with the traditional doctrinal requirements that specify that servitudes should enhance the utility of the dominant tenement (and not the mere personal interests of the individual who happens to be the owner of the land at the particular time).[187] The courts also neglected to consider the traditional policy concerns with the recognition of praedial servitudes in this context namely, monopoly promotion.[188] A monopoly promotion entails a company's exclusive possession or control of the supply of a trade in a commodity or service.[189] Courts merely acknowledge restraint of trade agreements as negative praedial servitudes on the basis that the original parties to the contract had the intention of creating such an agreement and provided that these agreements are registered in the public records.[190]

Hotard refers to these judgments as resting on 'cursory legal analyses' because the courts failed to thoroughly examine and implement the essential elements of praedial servitudes.[191] Lovett[192] in turn argues that the aforementioned case law can be understood as Louisiana's jurisprudencial uncritical drift toward American common law[193] norms, which have grown more receptive to treating covenants in restraint of trade as property interests provided that they are reasonable. Additionally, Louisiana

---

[186] A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209 1223-1224.
[187] JA Lovett "Title conditions restraint of trade" in VV Palmer & EC Reid (eds) *Mixed jurisdictions compared private law in Louisiana and Scotland Edinburgh Studies in Law Volume 6* (2006) 30 60.
[188] JA Lovett "Title conditions restraint of trade" in VV Palmer & EC Reid (eds) *Mixed jurisdictions compared private law in Louisiana and Scotland Edinburgh Studies in Law Volume 6* (2006) 30 59.
[189] K Kavanagh (ed) *South African concise Oxford dictionary* 9 ed (2009) 753.
[190] JA Lovett "Title conditions restraint of trade" in VV Palmer & EC Reid (eds) *Mixed jurisdictions compared private law in Louisiana and Scotland Edinburgh Studies in Law Volume 6* (2006) 30.
[191] A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209 1211.
[192] JA Lovett "Title conditions restraint of trade" in VV Palmer & EC Reid (eds) *Mixed jurisdictions compared private law in Louisiana and Scotland Edinburgh Studies in Law Volume 6* (2006) 30 60.
[193] § 3 6 of the *Restatement (Third) of Property: Servitudes* (2000); *Whitinsville Plaza Inc v Kotseas* 390 NE 2d 243 (Mass 1979); *Davidson Bros Inc v D Katz & Sons Inc* 579 A 2d 288 (NJ 1990). See also examples of case law enforcing "reasonable" restraint of trade clauses as real covenants: *Tippecanoe Associates II v Kimco Lafayette* 671 Inc 811 N E 2d 438 (Ind Ct App 2004) where it was held that a restrictive covenant in commercial lease agreements are enforceable; *Double Diamond Properties LLC v Amoco Oil Co* 487 F Supp 2d 737 (E D va 2007) where it was held that a covenant prohibiting the sale of petroleum products not supplied by an oil company is enforceable. See also JA Lovett "Title conditions restraint of trade" in VV Palmer & EC Reid (eds) *Mixed jurisdictions compared private law in Louisiana and Scotland Edinburgh Studies in Law Volume 6* (2006) 30 60 footnote 167. See also chapter 6 part 6 3 that will discuss American common law real covenants in restraint of trade.

jurisprudence appears to give the original parties to the agreement (and their successors in title) the leeway to impose information-processing externalities on other market participants (subsequent purchasers).[194] It is asserted that due to this deviating trend by the courts, the once venerable *numerus clausus* of property forms in Louisiana does not appear to restrict the creation of novel categories of property rights.[195]

However, one exception exists in Louisiana law, where the Federal District Court rejected the continual use of negative praedial servitudes in restraint of trade. In *SPE FO Holdings LLC v Retif Oil & Fuel LLC*[196] parties to an agreement of sale of business assets agreed that the seller would not use his property in competition with the purchaser's company by selling gas. The court held that a valid praedial servitude was not created.[197] In addition, the parties to the agreement did not specify a dominant tenement and therefore a praedial servitude could not have been formed.[198] The court rejected the use of a negative praedial servitude of restraint of trade.[199] The court stated that reasonable restraints on competition may create personal obligations between parties to the contract, but that such agreements may not establish real rights in Louisiana law.[200]

Hotard asserts that the jurisprudential authority[201] that the court used to substantiate the judgment was wrong as the authority cited by the court did not address whether restraint of trade clauses could potentially be created as real rights in Louisiana law.[202] He also makes the point that the court was wrong to declare that negative praedial servitudes of restraint of trade could *never* exist. However, the court's

---

[194] JA Lovett "Title conditions restraint of trade" in VV Palmer & EC Reid (eds) *Mixed jurisdictions compared private law in Louisiana and Scotland Edinburgh Studies in Law Volume 6* (2006) 30 60.
[195] JA Lovett "Title conditions restraint of trade" in VV Palmer & EC Reid (eds) *Mixed jurisdictions compared private law in Louisiana and Scotland Edinburgh Studies in Law Volume 6* (2006) 30 60.
[196] No 07-3779 2008 WL754716 1 (ED La Mar 19 2008). See A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209 1224.
[197] *SPE FO Holdings LLC v Retif Oil & Fuel LLC* No 07-3779 2008 WL754716 1 (ED La Mar 19 2008).
[198] *SPE FO Holdings LLC v Retif Oil & Fuel LLC* No 07-3779 2008 WL754716 3 (ED La Mar 19 2008).
[199] *SPE FO Holdings LLC v Retif Oil & Fuel LLC* No 07-3779 2008 WL754716 4 (ED La Mar 19 2008).
[200] *SPE FO Holdings LLC v Retif Oil & Fuel LLC* No 07-3779 2008 WL754716 4 (ED La Mar 19 2008).
[201] *SPE FO Holdings LLC v Retif Oil & Fuel LLC* No 07-3779 2008 WL754716 4 (ED La Mar 19 2008): caselaw wrongfully cited - *Leonard v Lavigne* 162 So 2d 341 (La 1964); *Soho Serve Corp v Westowne Ass'n* 929 F 2d 160 (5 Cir 1991).
[202] Instead the cases dealt with issues pertaining to lease agreements and whether lease agreements in Louisiana create real or personal rights: A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209 1225.

prejudice against negative praedial servitudes in restraint of trade at least had doctrinal support.[203]

The judgments in *R & K Bluebonnet Inc v Patout's of Baton Rouge Inc* and *Meadowcrest Center v Tenet Health System Hospitals Inc* are similar to the South African judgments of *Tonkin v Van Heerden*,[204] and *Venter v Minister of Railways*.[205] This is because the courts in all these cases failed to scrutinise and apply the essential criteria for the establishment of praedial servitudes, especially the *utilitas* requirement.[206] Arguably, the primary question should not be whether these agreements ought to be recognised as servitudes. A blanket rule, prohibiting negative praedial servitudes of restraint of trade would be implausible[207] as it is legally perceivable that these servitudes could exist, provided that all requirements are complied with as illustrated in chapter 5 part 5 2. The major problem is that the courts are not critical enough when dealing with these types of agreements. This is problematic because if courts do not take cognizance of the establishment requirements for praedial servitudes, restraint of trade clauses will be recognised as servitudes where the mere personal interests of the individual are satisfied instead of the clause benefiting the dominant tenement.[208] The danger of jurisprudence in Louisiana and South Africa following such an uncritical trend is that this approach would in effect promote the creation of trading monopolies disguised as servitudes, thereby potentially undermining and negating the traditional property principles. The point should be to eliminate restraints of trade being registered in the form of a praedial servitude where the servitude benefits an individual's personal interest and not the land as such. It is submitted that the question of whether these rights can be praedial servitudes is different to the question of whether they 'ought' to be, the latter question being discussed in chapter 6.

---

[203] AN Yiannopoulous *Louisiana civil law treatise: Praedial servitudes* vol 4 (2015) §6.56.
[204] 1935 NPD 589. See also CG Hall *CG Hall & EA Kellaway Servitudes* 3 ed (1973) 182; HJ Delport & NJJ Olivier *Sakereg vonnisbundel* 2 ed (1985) 576; MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 185-187.
[205] *Venter v Minister of Railways* 1949 (2) SA 178 (EC); CG Hall *CG Hall & EA Kellaway Servitudes* 3 ed (1973) 183; HJ Delport & NJJ Olivier *Sakereg vonnisbundel* 2 ed (1985) 548-549; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 613; MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 190-192.
[206] A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209 1223-1224.
[207] A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209- 1236.
[208] JA Lovett "Title conditions restraint of trade" in VV Palmer & EC Reid (eds) *Mixed jurisdictions compared private law in Louisiana and Scotland Edinburgh Studies in Law Volume 6* (2006) 30 60.

A close analysis of jurisprudence reveals that it is not always easy to prove that a benefit exists in favour of a dominant tenement.[209] In this respect, a praedial servitude in restraint of trade will be regarded as benefiting a dominant tenement when the dominant tenement has been 'altered or improved' to ensure that future owners will 'more likely than not' use the land for the similar purpose as was used by the owner who originally created the praedial servitude in restraint of trade.[210] One policy concern is the difficult task of determining whether a burden placed on the servient tenement in actual fact benefits the dominant tenement and not merely the interest of a person.[211] The distinction between rights that benefit a dominant tenement and those that do not in the context of restraint of trade servitudes is unclear in Louisiana as the Louisiana Civil Code does not define what a benefit to a dominant tenement will constitute in terms of article 647.[212] However, it is important that a distinction should exist between those benefits that serve a tenement and those that do not. If there is no such distinction, praedial servitudes will be established on the mere fact that the parties declared it to be so.[213]

Hotard provides conceivable examples where specific restraint of trade clauses can in actual fact benefit the dominant tenement.[214] There may be circumstances where a successor to the property may engage in the same profession as her predecessor. In such an instance, a praedial servitude of restraint of trade should benefit any future owner in accordance with article 647 of the Louisiana Civil Code.[215] An example would be when a gas station is built on land. The building of a gas station entails a construction which requires extensive alteration to the property by means of

---

[209] A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209 1229. See chapter 3 part 3 2 2 5 for a discussion of South African academic scholars views pertaining to determining whether a servitude benefits the land or the personal interests of the property owner. See also AJ van der Walt *The law of servitudes* (2016) 133. For jurisprudence relating to Louisana see *Textron Fin Corp v Retif Oil & Fuel LLC* 342 F App x 29 33 (5 Cir 2009) where the court held that the parties agreed to a burden for the benefit of a person instead of a separate tenement. In this regard, see also A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209 1230.

[210] A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209 1229.

[211] A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209 1229-1230.

[212] A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209 1230.

[213] A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209 1231-1232.

[214] A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209 1236.

[215] A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209 1236.

burying gas tanks and the installation of pumps. A future purchaser of the property might consider to demolish the existing structures and may build new structures desired by her. However, it would be an extremely expensive task to demolish and eradicate the improvements made by her predecessor. In reality, an individual who purchases the land on which the gas station is located will most likely intend to make use of the structures located on the land in order to operate the same form of business as the property's previous owner. Similar examples would include movie theatres or oil refineries. Thus, where a future successor in title of the property engages in the same business as the original owner, the praedial servitude of restraint of trade will be regarded as benefiting the dominant tenement. In the abovementioned example, the owner of the gas station (as the owner of the dominant tenement) will benefit from a servitude which prohibits neighbouring estates from selling gasoline.[216] To address all of the policy concerns, Hotard suggests that legislative solutions ought to be provided.[217]

The following section will provide a proposition as to how courts in general should proceed when confronted with restraint of trade clauses that could potentially be acknowledged as a praedial servitude. It is clear that authority exists in South African law for the recognition of a negative praedial trading servitude.[218] These cases to a certain extent support De Waal's argument that the land must be developed, appointed and used in a way that would render the servitude useful for the dominant land on a durable basis. However, the courts in these two South African cases did not explicitly discuss the *utilitas* requirement in a critical light as it should have. The analysis proposed below would support and strengthen De Waal's argument pertaining to the *utilitas* requirement and propose how courts should go about engaging in recognising these servitudes. Furthermore, in light of policy concerns, the subsequent analysis also provides a flexible approach to ensure that effect is given to traditional property legal principles, while at the same time allowing for flexibility. The hope is to achieve and provide a solution that will allow the free alienability of land while at the same time still respecting the ability of private parties to meaningfully enter into contractual

[216] A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209 1237.
[217] A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209 1242.
[218] *Hotel De Aar v Jonordon Investment (Edms) Bpk* 1972 (2) SA 400 (A); *Bedford Square Properties (Pty) Ltd v Erf 179 Bedfordview* 2011 (5) SA 206 (SCA).

agreements regarding the future use of land.[219] Fairness of the enforcement of the covenant by and against subsequent purchasers and the protection of the public interest are important factors that will be taken into consideration. Therefore, the analysis seeks to provide an adequate balance of the needs of businesses and the needs of the public in the recognition of servitudes in restraint of trade.

#### *5 3 2 3 Proposed solution in Louisiana*

Hotard suggests that the legislature should allow servitudes in restraint of trade purely as secondary obligations in contractual agreements. In other words, the primary core of the contract should be the sale of land or the sale of business assets and the restraint of trade clause should be incorporated as a secondary obligation to the contract.[220] This rule would have the effect of limiting the amount of properties that can be removed from commerce.[221] At the same time it will allow businesses to protect their interests when they dispose of additional land.[222] An example that clearly illustrates the scenario where the sale of land was the primary core of the contract and the restraint of trade clause an incidental obligation to the contract of sale, would be the case of *R & K Bluebonnet Inc v Patout's of Baton Rouge Inc*.[223] In this case owners of land set land aside to build a new restaurant. The remainder of their land was sold subject to a restraint of trade agreement prohibiting the land sold to be used as a seafood restaurant.

An additional reason for proposing that the noncompetition agreements be secondary instead of forming the primary constituent of the contractual agreement, is

[219] L Butler & M Klepper "Covenants not to compete in the real property context: An update" (1994) *Popular Media* 35 39.
[220] A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209 1242.
[221] A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209 1242-1243.
[222] A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209 1243.
[223] 521 So 2d 634, 635 (La Ct App 1988). See discussion and analysis of case in JA Lovett "Title conditions restraint of trade" in VV Palmer & EC Reid (eds) *Mixed jurisdictions compared private law in Louisiana and Scotland Edinburgh Studies in Law Volume 6* (2006) 30 58; AG McBride "The need for legislative authorization of noncompete servitudes in commercial leases" (2017) 61 *Loyola Law Review* 325 347 and A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209 1222.

that this restriction will prevent businesses from creating monopolies.[224] If restraint of trade agreements form the primary constituent of a contractual agreement without property being sold, businesses will create monopolies if they are given the leeway to negotiate freely for praedial servitudes in restraint of trade with their neighbours. The provision suggested by Hotard is needed especially if one considers the simplicity with which a business may create these forms of servitudes with their neighbours without a contract of sale being involved. If businesses are given the scope to freely negotiate negative servitudes in restraint of trade with neighbouring owners of land, it will lead to a proliferation of burdens on land for the benefit of businesses in their personal capacity and not for the benefit of their land. No homeowner would hesitate to accept money for a promise that her home will never be used for the purposes of constructing a gas station, nor would any grocer turn down a cash windfall for the promise not to become an auto repair shop. Therefore, it is in the interest of the public to prevent this form of abuse.

Secondly, the duration of praedial servitudes in restraint of trade should be limited by the legislature by means of establishing a maximum enforceable period. The duration period of a servitude in this context should be lengthy enough to be meaningful. However, it should also be short enough to guarantee that the property is reverted to free commercial use within a reasonable time. The precise period of duration of the praedial servitude in restraint of trade should be investigated comprehensively with the input of business owners.[225] The current two-year statutory term for personal obligations in restraint of trade is very short if it had to be applied to meaningful praedial servitudes.[226] Real rights bind future owners, and as a result the duration of the praedial servitude should in principle be long enough to see the property changing hands of ownership.[227] Therefore, a period of ten years appears to be a

[224] A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209 1243.
[225] A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209 1243-1244.
[226] Louisiana Revised Statute §23:921 (2017): restraint of trade agreements are not enforceable unless it falls within a category of defined exceptions. The specific statute states that a contractual agreement restraining individuals from exercising a lawful profession, trade or business will be null and void except for the agreements as provided in the relevant statute. Agreements that are categorized as exceptions are contracts regulating employment relationships, the sale of a company's goodwill, business partnerships and franchise. Except for franchise agreements, the other agreements are limited to a period of two years. See also A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209 1227-1228, 1244.
[227] A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209 1244.

satisfactory maximum as it will allow a business with enough opportunity to enjoy the purchase of the property.[228] The benefit is also that the property will be returned in less than a single generation and the land will be available for free usage.

Thirdly, the legislature should include a provision that requires the agreement in restraint of trade to be in writing that clearly stipulates the specific industries or trade that are prohibited. In other words, the clause should not be construed to prohibit competition with the dominant tenement generally. As part of the *utilitas* requirement, the dominant tenement should be developed for a specific use such as a theatre, oil refinery, restaurant, petrol station or a factory etc. It must be developed and appointed for a specific use. In such cases, a praedial servitude in restraint of trade's benefit for the dominant tenement will come to an end when the trade-specific construction on the dominant tenement is removed by the dominant tenement owner. The reason for suggesting that the restraint of trade clause should be specific is as follows: A dominant tenement owner may intend to develop and construct a new trade or industry. This will lead to the owner demolishing the initial trade-specific-construction on the dominant tenement and substituting the modifications on the dominant tenement. The owner may attempt to pursue a new trade while still attempting to enforce the old, original and generally-worded servitude in restraint of trade.[229] If this should be the outcome, it will be questionable and also unreasonable towards the servient tenement owner who might be forced out of a particular trade or industry that was once permitted in terms of the initial servitude contract.

Finally, the legislature should clarify the law of Louisiana regarding praedial servitudes by means of explicitly including a prerequisite that the dominant tenement should be permanently dedicated to a particular trade or business. The problem in Louisiana is that courts have misconstrued the law of praedial servitudes in that they have not analysed whether the restraint of trade agreement actually benefits the dominant tenement. As mentioned before, a benefit will only exist in cases where a potential future owner of the dominant tenement will be committed to the same trade as her predecessors. The dominant tenement must be modified to such an extent that dedicates it to a particular trade or industry. When this provision is codified in legislation

[228] A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209 1244.
[229] A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209 1245.

it will create a change in legal practice because courts will be forced to take the *utilitas* requirement into consideration. Until recently, they have ignored the law pertaining to the *utilitas* requirement in praedial servitudes. Even though the statutory and doctrinal frameworks of South African law for the creation of limited real rights are strict enough to prevent novel servitudes in restraint of trade from eroding ownership and creating a proliferation of burdens on land, the suggestions provided by Hotard will enhance and reinforce security against the proliferation of burdens on land if implemented in South African law. Furthermore, these suggestions would also accommodate policy concerns pertaining to negative praedial servitudes in restraint of trade.

A suggestion made by Hotard that can be used in South African law is that the restraint of trade agreement should always be the secondary object of a contractual agreement where a portion of land (that will serve as a servient tenement) is sold subject to a restraint of trade agreement. This will protect the land from competition, provided that the land will serve as a dominant tenement that it is dedicated for a specific trade and it complies with all the relevant requirements for the registration of such a right. As mentioned, this will prohibit private parties from negotiating restraint of trade agreements freely with the effect of overburdening land. South Africa should also adopt a rule that will regulate the maximum duration of praedial servitudes in restraint of trade. This rule will ensure that the burden will be removed from the land after a certain period, thereby ensuring that the land will be made available for other usage. As a means of formality, it is submitted that South Africa should also adopt the proposal that the intention of the parties agreeing to the restraint of trade agreement should be clear to the extent that the trade being prohibited is reflected clearly. This will prevent the dominant tenement owner from phrasing the restraint of trade agreement generally as this could lead to mismanagement, especially if the dominant tenement owner intends to use the restraint of trade agreement to prohibit all forms of trade competition. The proposal that the requirement should exist that the dominant tenement should be dedicated for a specific relatively durable trade reinforces De Waal's proposal that has been discussed extensively in chapters 3, 4 and in part 5 2 of this chapter. As shown in chapter 3 part 3 2 2 5 2, the somewhat wider interpretation of the *utilitas* requirement has never been explicitly formulated by South African courts. South African courts have never explicitly indicated that this interpretation is preferable to the other two interpretations of the *utilitas* requirements. However, De Waal correctly asserts that certain South African judgments can only be explained in terms of the

somewhat wider interpretation of the *utilitas* requirement.[230] Even though South Africa's current doctrinal and statutory framework is sufficient to regulate the creation of novel categories of limited real rights such as servitudes in restraint of trade, some courts still do not apply the law properly. Therefore, it is submitted that the common law requirements should be applied correctly by courts as illustrated in chapters 2 and 3. These chapters show that trading servitudes can be accommodated within our current approach. However, since servitudes in restraint of trade create burdens on land, it is proposed that restrictions should be adopted and applied with regard to the recognition of negative servitudes in restraint of trade. A legislative framework should be adopted that includes the proposals made by Hotard and De Waal in South African law. If their suggestions are incorporated in South African law, it will ensure strict application of the law as it will force courts to meaningfully engage with the law before recognising restraint of trade agreements as negative praedial trading servitudes. Furthermore, it will ensure that the rights of parties benefitting from the servitude and affected thereby are balanced. It will also safeguard these servitudes from becoming onerous. The following section will discuss negative personal servitudes in restraint of trade.

## 5 4 Negative personal trading servitudes in South African law

The South African authority pertaining to negative, personal servitudes in restraint of trade has been inconclusive until 2016 when the Constitutional Court in *Masstores (Pty) Ltd v Pick 'n Pay Retailers (Pty) Ltd*[231] shed light on the matter regarding restraint of trade clauses embedded in commercial lease agreements. The case concerned an alleged interference by the applicant (a third party co-tenant) with the trade of the respondent (anchor tenant) in a shopping center. The 'trade' that the anchor tenant sought to protect was an exclusive contractual right to trade as a supermarket in a shopping center, granted to the anchor tenant by the lessor in a lease agreement which embedded an exclusive use covenant. The anchor tenant did not seek enforcement of the contractual exclusivity right against the lessor, but against the third party co-tenant, although there was no contractual relationship between the anchor tenant and co-

[230] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 194-195. See also CG van der Merwe "Die nutsvereiste by erfdiensbaarhede" in DJ Joubert (ed) *Petere Fontes: LC Steyn Gedenkbundel* (1980) 163 172.
[231] 2017 (1) SA 613 (CC).

tenant. The co-tenant was nonetheless aware of the restraint of trade clause. The relief sought was against the third party co-tenant under the delict of 'interference with contractual relations'. The anchor tenant contended that the third party co-tenant's breach of its own lease agreement with the landlord, which prohibited it from operating a supermarket in the shopping center, was also an intentional interference with the anchor tenant's contractual relations with the landlord.

The High Court interdicted the third party co-tenant from operating the supermarket in breach of its own lease agreement with the landlord.[232] The Supreme Court of Appeal upheld the court a *quo*'s finding on the basis that this kind of prevention of contractual performance constituted wrongful conduct, actionable in delict under South African law.[233] However, in the Constitutional Court Froneman J stated that South African law does not usually recognise exclusive rights as worthy of general protection because the underlying purpose of the law of unlawful competition is to protect free competition and not to undermine competition by making it less free.[234] Froneman J also stated that there is no legal duty on third parties to refrain from infringing contractually derived exclusive rights to trade.[235]

This case is important for purposes of this dissertation because Froneman J asserted that to protect an exclusive right to trade embedded in a lease agreement, the anchor tenant *should have* negotiated for a real right, like a negative personal servitude and not merely a personal right as it did in this case. This is because a real right like a personal servitude would have given notice to all later lessees that their usage of their leased premises is limited.[236] It appears from this judgment that courts would not object to the registration of a personal servitude to conduct or to prevent trade on the servient land. Van der Merwe and Pienaar are of the view that a negative personal servitude in restraint of trade will only be enforceable if it is registered against

[232] *Pick 'n Pay Retailers (Pty) Ltd v Masstores (Pty) Ltd* unreported decision (46501/2014) [2014] ZAGPPHC 769 (26 September 2014). This judgment was overruled by the Constitutional Court.
[233] *Masstores (Pty) Ltd v Pick 'n Pay Retailers (Pty) Ltd and Another* 2016 (2) SA 586 (SCA) 22.
[234] *Masstores (Pty) Limited v Pick 'n Pay Retailers (Pty) Limited* 2017 (1) SA 613 (CC) 33.
[235] *Masstores (Pty) Limited v Pick 'n Pay Retailers (Pty) Limited* 2017 (1) SA 613 (CC) 36.
[236] *Masstores (Pty) Limited v Pick 'n Pay Retailers (Pty) Limited* 2017 (1) SA 613 (CC) 44. Interestingly enough, Louisiana does not permit a restraint of trade clause embedded in a commercial lease agreement as a real property right due to the personal nature of a lease agreement in Louisiana law. This is reflected in *Winn-Dixie Stores Inc v Dolgencorp LLC* 746 F 3d 1008 (11 Cir 2014) 1030-1031. However, in common law states such as Florida, exclusive use covenants embedded in lease agreements can be elevated to real covenants with third party proprietary effect. Chapter 6 part 6 3 will provide a discussion of such recognised alternative mechanisms of structuring an agreement in restraint of trade.

the servient tenement. However, they argue that it is clear that the premises leased by Masstores does not qualify as a servient tenement against which such a negative personal servitude can be registered.[237] No reasons are provided by them to substantiate their argument.

Contrary to the views of Van der Merwe and Pienaar, it does seem possible that the premises leased by Masstores could serve as a servient tenement. Firstly, the intention of the anchor tenant and the owner of the shopping center should be to register a negative personal servitude in restraint of trade that will burden the units in the shopping center for the benefit of the anchor tenant. The nature of such a servitudal right is that it has the effect of subtracting from the owner of the shopping center's *dominium* because the owner will be restricted from leasing shopping units to competitors of the anchor tenant as indicated in the exclusive use covenant. Personal servitudes, restricting trade should only be registered provided that the requirements for the creation of a limited real right in land are satisfied.[238] In light of the fact that it is conceivable that the intention and subtraction from the *dominium* tests could be met, this particular right qualifies to be registered in the Deeds Registry and on the title deed of the shopping center in terms of section 63(1) of the Deeds Registries Act. As Froneman J correctly asserted, registration of a negative personal servitude in restraint of trade will provide a future lessee of a unit in the shopping center with notice of the existence of such a servitude. Furthermore, since the *utilitas* requirement does not apply to personal servitudes, no principled reason appears as to why such a servitude would not be permissible.[239] However, as alluded to in chapter 3, it is *not* possible to categorise personal servitudes in restraint of trade under the traditional categories of personal servitude.[240] This is because the content of the traditionally recognised categories of personal servitudes are generally incompatible with the content of a negative servitude in restraint of trade. This does not mean that novel categories of

---

[237] CG van der Merwe & JM Pienaar "The law of property" 2016 *Annual Survey of South African Law* 885-886.

[238] See chapters 2 and 3. Louisiana law in turn invalidates personal servitudes in restraint of trade. The reasoning behind this stance is based on public policy concerns for providing notice to third parties of the existence of the servitude. In addition, Louisiana is also against allowing remotely located entities to decide the commercial use of land. This is because bad policy would emerge if for example a shoe manufacturer is entitled to perpetually restrict competition in numerous shopping centers by holding personal servitudes binding various properties used as shoe stores to exclusively sell its shoes as this would create a trading monopoly. See AG McBride "The need for legislative authorization of noncompete servitudes in commercial leases" (2017) 61 *Loyola Law Review* 325 336, 339.

[239] AJ van der Walt *The law of servitudes* (2016) 503.

[240] See chapter 3 part 3 3.

personal servitudes cannot be created because no *numerus clausus* of personal servitudes exists.[241] In light of this, and the fact that the *Masstores* case recognised a negative personal servitude in restraint of trade for the first time in South African law, a negative servitude in restraint of trade would most likely be categorised under a novel category of personal servitude. Such a novel category of personal servitude will also have to comply with the requirements regulating the creation, registration, amendment, lapse or termination of the personal servitude as set out in sections 65-76 of the Deeds Registries Act.[242] Furthermore, it should also comply with the writing requirement in the Alienation of Land Act[243] and restrictions on the creation of servitudes on agricultural land in the Subdivision of Agricultural Land.[244] Another important common law principle that is embodied in section 66 of the Deeds Registries Act, is that a personal servitude may not exceed the lifetime of a beneficiary and is not transferable.[245] These principles ensure that only rights that qualify as limited real rights in land are acknowledged in the form of servitudes. Furthermore, it also ensures that such rights are created and used to an extent that will not lead to an unchecked proliferation of burdens on land or the erosion of the servient owner's residual right.

It should be possible to create a negative personal servitude in restraint of trade in terms of *Masstores* and the aforementioned reasons. However, in the recent case of *Quest Petroleum (Pty) Ltd v Walters and Another*, the court decided otherwise.[246] This case concerns the enforcement by the applicant of what it termed a 'product servitude' at a petrol station that was owned by the first respondent.[247] The first respondent bought the filling station from the second respondent and accepted the second respondent as her tenant.[248] Since 2013, the applicant supplied petroleum products to the second respondent. When the first respondent became the owner of the petrol station a tripartite agreement was concluded between the applicant, and the

[241] AJ van der Walt *The law of servitudes* (2016) 460.
[242] AJ van der Walt "*Novel servitudes Liber Amicorum – Essays in honour of JC Sonnekus Sakereg*" 2017 *Tydskrif vir die Suid-Afrikaanse Reg* 408 410.
[243] 68 of 1981.
[244] 70 of 1970.
[245] AJ van der Walt "*Novel servitudes Liber Amicorum – Essays in honour of JC Sonnekus Sakereg*" 2017 *Tydskrif vir die Suid-Afrikaanse Reg* 408 411.
[246] *Quest Petroleum (Pty) Ltd v Walters and Another* unreported decision (16225/2017) [2018] ZAWCHC 163 (9 November 2018). See discussion of the *Quest* case in ZT Boggenpoel "The law of property" 2018 (4) *Juta Quarterly Review* para 2.1.
[247] *Quest Petroleum (Pty) Ltd v Walters and Another* unreported decision (16225/2017) [2018] ZAWCHC 163 (9 November 2018) para 1.
[248] *Quest Petroleum (Pty) Ltd v Walters and Another* unreported decision (16225/2017) [2018] ZAWCHC 163 (9 November 2018) paras 3-4.

first and second respondents.[249] In terms of the tripartite agreement, the applicants demanded that a servitude should be registered over the petrol station in favour of the applicant in terms of which only its products would be sold on the premises. The commercial motivation for this servitude was that the applicant spent a lot of money in placing its brand material and pumps on the premises. Furthermore, the registration of a servitude would guarantee that the right to supply fuel to the petrol station was protected for a prolonged period of time to justify the capital expenditure. The tripartite agreement was revised,[250] the tenancy of the second respondent was eventually cancelled and the first respondent took over the running of the fuel station business.[251] The applicant and first respondent entered into a memorandum of agreement in which the applicant offered to pay an additional amount to the first respondent pertaining to the rental on the condition that the product servitude be registered and that the property would be leased for a period of 10 years.[252] The notarial deed of servitude was eventually registered.

A dispute ensued once the first respondent sent the applicant an email requesting that it was entitled to payment from the applicant in terms of the memorandum of agreement entered into between the applicant and first respondent.[253] The applicant was instructed to comply with the demand within a period of 7 days. The first respondent threatened to cancel all three agreements upon failure of payment. The applicant did not honour the memorandum of agreement.[254] As a result, the first respondent notified the applicant that all three agreements would be cancelled.

The applicant approached the High Court and sought an order that the first respondent be interdicted 'from allowing other automotive fuel or petroleum products to be stored, handled, used, sold, dealt with in or distributed on or from the portion of the servient tenement'.[255] The first respondent opposed the application and lodged a

[249] *Quest Petroleum (Pty) Ltd v Walters and Another* unreported decision (16225/2017) [2018] ZAWCHC 163 (9 November 2018) 5.
[250] *Quest Petroleum (Pty) Ltd v Walters and Another* unreported decision (16225/2017) [2018] ZAWCHC 163 (9 November 2018) paras 11-14.
[251] *Quest Petroleum (Pty) Ltd v Walters and Another* (16225/2017) [2018] ZAWCHC 163 (9 November 2018) paras 15-16.
[252] *Quest Petroleum (Pty) Ltd v Walters and Another* (16225/2017) [2018] ZAWCHC 163 (9 November 2018) paras 12-14.
[253] *Quest Petroleum (Pty) Ltd v Walters and Another* unreported decision (16225/2017) [2018] ZAWCHC 163 (9 November 2018) paras 17-18.
[254] *Quest Petroleum (Pty) Ltd v Walters and Another* unreported decision (16225/2017) [2018] ZAWCHC 163 (9 November 2018) para 19.
[255] *Quest Petroleum (Pty) Ltd v Walters and Another* unreported decision (16225/2017) [2018] ZAWCHC 163 (9 November 2018) para 23.

counter application that the court shall declare that it was a tacit term of the tripartite agreement, the memorandum of agreement and of the servitude agreement that if anyone of the agreements is void and unenforceable, the agreements would be lawfully cancelled or lawfully terminated.[256]

The applicant did not contest cancellation of the memorandum of agreement. However, the applicant denied that the respondent had any grounds to cancel the servitude.[257] The respondent argued that the tripartite agreement and memorandum of agreement are inextricably linked and dependent on each other and as such they collectively formed the *causa* of the servitude that is registered against the property.[258]

The respondents argued that the servitudal agreement is 'prejudicial, unjust, unreasonable, onerous and oppressive' in relation to the first respondent and in favour of the applicant and that the enforcement thereof will contravene the first respondent's 'rights of ownership in, and use of her property and her right to freely trade' as entrenched in the Constitution of the Republic of South Africa 1996 and the Consumer Protection Act 68 of 2008.[259] It is alleged that the purported enforcement of the agreement and the servitude is against public policy and therefore void *ab initio* and unenforceable.

The court's point of departure was to question whether the product servitude could have the nature of a servitude. The court discussed the common law requirements regarding praedial and personal servitudes.[260] In this regard, it ruled that the so-called product servitude could never have qualified as a personal servitude because it did not fit the description of the traditional categories of personal servitudes, namely *usus*, *usufructus* and *habitatio*.[261] Furthermore, since there was no attempt to interpret the applicant's rights arising from the notarial deed as a praedial servitude, there is no room for such a categorisation in light of the fact that there is only one

[256] *Quest Petroleum (Pty) Ltd v Walters and Another* unreported decision (16225/2017) [2018] ZAWCHC 163 (9 November 2018) para 24.
[257] *Quest Petroleum (Pty) Ltd v Walters and Another* unreported decision (16225/2017) [2018] ZAWCHC 163 (9 November 2018) para 25.
[258] *Quest Petroleum (Pty) Ltd v Walters and Another* unreported decision (16225/2017) [2018] ZAWCHC 163 (9 November 2018) para 26.1.
[259] *Quest Petroleum (Pty) Ltd v Walters and Another* unreported decision (16225/2017) [2018] ZAWCHC 163 (9 November 2018) para 26.3.
[260] *Quest Petroleum (Pty) Ltd v Walters and Another* unreported decision (16225/2017) [2018] ZAWCHC 163 (9 November 2018) para 27-31.
[261] *Quest Petroleum (Pty) Ltd v Walters and Another* unreported decision (16225/2017) [2018] ZAWCHC 163 (9 November 2018) paras 31-32.

tenement involved which the court surprisingly asserted was neither a servient nor a dominant tenement.[262] The court stated that the product servitude is no more than a recordal of ordinary contractual rights and obligations.[263] Consequently, a product servitude has no special status in South African law and it should not be interpreted in accordance with the law pertaining to servitudes. This is because a product servitude should be interpreted in terms of the customary approach to the interpretation of written instruments, which are the product of agreements. The applicant conceded that even though the three agreements were linked, such linkage did not preclude the product servitude from standing on its own. Contrary to the applicant's arguments, the court ruled that both the tripartite agreement and the memorandum of agreement had been lawfully cancelled and that because the product servitude is no longer capable of enforcement, it follows that the applicant had not established the requisite right, entitling it to the interdictory relief sought. [264]

In relation to the utterings in *Masstores* that a personal servitude in restraint of trade is possible, the outcome in the *Quest* decision creates considerable confusion. It should be remembered that the Constitutional Court in *Masstores* established that it is possible to register a negative personal servitude in restraint of trade whereas in *Quest* the High Court has now confirmed that it is not possible. The outcomes of these two judgments are clearly inconsistent which of course begs the question which one is correct.

It is also important to note that the factual context of the negative personal servitude in restraint of trade agreement, differs vastly from each other. In *Masstores*, the anchor tenant sought to protect an exclusive contractual right to trade as a supermarket in a shopping center that was granted to the anchor tenant by the lessor in terms of a lease agreement. In *Quest,* the owner of the petrol station was barred from selling all petroleum and oil products produced by the competitors of Quest. Additionally, the restraint of trade agreement also placed a positive obligation on the owner of the petrol station to exclusively sell the products that were produced by Quest. The question that should be determined is whether the context of the restraint of trade

[262] *Quest Petroleum (Pty) Ltd v Walters and Another* unreported decision (16225/2017) [2018] ZAWCHC 163 (9 November 2018) para 32.
[263] *Quest Petroleum (Pty) Ltd v Walters and Another* unreported decision (16225/2017) [2018] ZAWCHC 163 (9 November 2018) para 33.
[264] *Quest Petroleum (Pty) Ltd v Walters and Another* unreported decision (16225/2017) [2018] ZAWCHC 163 (9 November 2018) paras 74-74.

agreement in *Quest* was so different to the agreement in *Masstores*, so as to justify the different outcomes in the respective cases. Or could it be that the court negated the possibility of the general existence of a negative personal servitude in restraint of trade entirely in South African law?

It is not clear, but it appears from the judgment, that a restraint of trade agreement could *never* fit the description of a negative personal servitude. This is because the court stated that a product servitude has no special status in South African law and that it should not be interpreted in accordance with the law regulating servitudes.[265] Furthermore, the court explicitly held that a restraint of trade agreement could only fit the description of a personal right and therefore should be regulated by the law of contract.[266]

This dissertation contends that the court erred in its judgment. The essence of the restraint of trade agreement in *Quest* arguably constitutes a burden upon the land and has the effect of diminishing the use of the property in the physical sense. Therefore, it can be said that it is a registrable, limited real right in terms of section 63(1) of the Deeds Registries Act because it complies with the subtraction from the *dominium* test as formulated in *Lorentz v Melle and Others*.[267] The court should at least be commended for discussing the second step of the enquiry to determine whether the specific condition complied with the common law requirements for the establishment of praedial and personal servitudes. However, the court's implementation of the requirements to the restraint of trade agreement was arguably erroneous. Due to the fact that a dominant tenement is not involved in this case, it is not necessary to consider the requirements for the establishment of a praedial servitude. The facts of this case lean toward the possible creation of a personal servitude and therefore the establishment requirements of a personal servitude should be implemented. The court held that a negative personal servitude in restraint of trade does not fit the description of the traditional categories of personal servitudes, namely *ususfructus*, *usus* and

[265] *Quest Petroleum (Pty) Ltd v Walters and Another* unreported decision (16225/2017) [2018] ZAWCHC 163 (9 November 2018) para 33.
[266] *Quest Petroleum (Pty) Ltd v Walters and Another* unreported decision (16225/2017) [2018] ZAWCHC 163 (9 November 2018) para 33.
[267] *Lorentz v Melle and Others* 1978 (3) SA 1044 (T) 1052; AJ van der Walt "Personal rights and limited real rights: A historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *Tydskrif vir Heedendaagse Romeins-Hollandse Reg* 170 195-196. See also chapter 2 part 2 4 2 for a discussion of the subtraction from the *dominium* test.

*habitatio*.[268] Even though this statement is true as explained in chapter 3 part 3 3, it cannot be inferred that the recognition of novel categories of personal servitudes are precluded. This is because no *numerus clausus* of personal servitudes exists in South African law.[269] As illustrated in chapter 3 part 3 3, and as argued in the context of *Masstores* above, a negative personal servitude in restraint of trade could arguably be categorised as a completely new category of personal servitude.

The court's declaration that the petrol station could not serve as a servient tenement is also surprising and questionable. This is because it is clearly conceivable that the petrol station could serve as a servient tenement. The reason for this is that the definition of a personal servitude clearly stipulates that a personal servitude is a limited real right to the movable or immovable property owned by someone else. A personal servitude bequests entitlements of use and enjoyment over the property to the beneficiary of the servitude in their personal capacity and not in their capacity as owner of the land.[270] The content of the agreement between Quest and the first respondent clearly fits the definition of a personal servitude. The aspect that makes the personal servitude negative is the agreement prohibiting the owner of the petrol station from selling petroleum and oil products of Quest's competitor. Therefore, this could clearly have been formulated as a negative personal servitude in restraint of trade.

The part of the agreement between Quest and the first respondent that obliges the owners of the petrol station to exclusively sell petroleum products from Quest, could arguably fit the description of a positive personal trading servitude as discussed in chapter 3 part 3 3 and chapter 4 part 4 3. This is because the nature of the burden is positive in that it compels the owner of the servient tenement to exclusively sell Quest's products. A positive right to trade on another individual's land resembles the content of a personal servitude of *usus*.[271] In South African law, authority exists that a usuary has a right to use the land for commercial purposes in order to gain profit.[272] A positive

[268] *Quest Petroleum (Pty) Ltd v Walters and Another* unreported decision (16225/2017) [2018] ZAWCHC 163 (9 November 2018) paras 31-32.
[269] AJ van der Walt *The law of servitudes* (2016) 460.
[270] CG van der Merwe *Sakereg* 2 ed (1989) 506; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 338; AJ van der Walt *The law of servitudes* (2016) 455-464; L Kiewitz *Relocation of a specified servitude of right of way* LLM thesis Stellenbosch University (2010) 11.
[271] See chapter 3 part 3 3 2 3 and chapter 4 parts 4 3 and 4 4.
[272] *Johannesburg Municipality v Transvaal Cold Storage Ltd* 1904 TS 722 729.

personal trading servitude could also take the form of the personal servitude category of *servitutes irregulares*.[273] These types of servitudes are praedial in their content but are established as personal servitudes because they benefit an individual or juristic person without any reference to a dominant tenement.[274] Van der Merwe also lists the right to trade on another individual's property as an example of a *servitutes irregulares*.[275] Van der Walt, on the other hand, regards positive and negative trading servitudes as completely new categories of servitudes.[276] In *Quest*, the applicant's trademarked material and pumps were already installed and used on the premises of the petrol station.[277] The facts of the case comply with the requirements for the establishment of a personal trading servitude. In light of the facts of the case and the aforementioned authority, the agreement obliging the owner of the petrol station to solely sell Quest's products could fit the construct of a positive personal trading servitude. Moreover, the content of the restraint of trade agreement in *Quest* should possibly have been constructed as both a positive and negative personal trading servitude. No formal requirements exist that would prohibit such a form of servitude from being recognised.

The policy reasons provided by the first respondent against the recognition of personal trading servitudes, namely that it is 'prejudicial, unjust, unreasonable, onerous and oppressive' are plausible.[278] However, the policy reasons are not convincing enough to preclude trading servitudes from being recognised as a personal servitude especially if the owner of the servient tenement is willing to accept registration of such a servitude over the servient tenement.

---

[273] See chapter 3 part 3 3 2 5.

[274] AJ van der Walt *The law of servitudes* (2016) 497-498; CG van der Merwe *Sakereg* 2 ed (1989) 507; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 341.

[275] CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2 ed (2010) para 580 cites the following case law recognising the right to trade on another individual's property as a personal servitude (*servitutes irregulares*) that will be discussed extensively in chapter 4 3: *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1913 AD 267 281; *Potgieter and Another v Minty and Sons and Additional Magistrate Barberton* 1929 TPD 745 753; *Mergold Beleggings (Edms) Bpk v Bhamjee en 'n Ander* 1983 (1) SA 663 (T); *Bhamjee en 'n Ander v Mergold Beleggings (Edms) Bpk* 1983 (4) SA 555 (T); J Scott "*Bhamjee v Mergold Beleggings (Edms) Bpk* 1983 (4) SA 555 (T) Persoonlike serwituut – aard van – oordraagbaarheid" (1984) 47 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 351.

[276] AJ van der Walt *The law of servitudes* (2016) 498 footnote 164.

[277] See chapter 3 part 3 3 2 3.

[278] See chapter 5 part 5 2 4 for the policy reasons against recognition of negative servitudes in restraint of trade. *Quest Petroleum (Pty) Ltd v Walters and Another* unreported decision (16225/2017) [2018] ZAWCHC 163 (9 November 2018) para 26.3.

## 5 5 Conclusion

The first part of the chapter analysed South African case law. It highlighted the fact that in the past South African courts tended to recognise negative praedial servitudes in restraint of trade, without considering whether it was in compliance with all the requirements for the establishment of a praedial servitude. Part 5 2 also highlighted the dangers that could exist if courts fail to apply a critical approach when confronted with the issue of whether a restraint of trade condition qualifies as a praedial servitude, namely the erosion of ownership and a proliferation of burdens on land. The *Tonkin* and *Venter* cases are examples of situations where there was arguably no compliance with the *utilitas* requirement for the creation of negative praedial servitudes in restraint of trade. Therefore, even if the court had taken the requirement into account, the facts of the case should have pointed towards the non-recognition of negative praedial servitudes. A praedial servitude should probably not have been allowed in *Tonkin* and *Venter* because the *utilitas* requirement was not satisfactorily complied with. In this regard, the dominant tenement was not specifically developed for a use that could have benefited from the restraint of trade on a relatively durable basis. When courts simply assume that a negative praedial servitude exists without following the logical methodology as suggested in chapter 3, it may lead to a wrong result as reflected in *Tonkin* and *Venter*. Therefore, caution should be exercised in order to establish whether a specific condition or clause should take the form of a praedial servitude. As the law developed in South Africa, case law gradually began to consider whether the *utilitas* requirement was satisfied in the context where the use of the dominant land complies with certain development-and-appointment requirements. In *Hotel De Aar v Jonordon Investment (Edms) Bpk* the court seem to confirm, albeit not explicitly, that the condition could be registered as a negative praedial trading servitude because it created a benefit for the dominant land, which had been developed as a hotel business. *Bedford Square Properties (Pty) Ltd v Erf 179 Bedfordview*[279] also confirms, although again not explicitly, that restrictions on trade that serve the lasting benefit of every successive owner of the dominant land and that satisfy the *utilitas* requirement can be recognised as praedial servitudes.[280] The servitude was regarded as valid due to the

[279] 2011 (5) SA 206 (SCA); AJ van der Walt *The law of servitudes* (2016) 444.
[280] AJ van der Walt "*Novel servitudes Liber Amicorum – Essays in honour of JC Sonnekus Sakereg*" 2017 *Tydskrif vir die Suid-Afrikaanse Reg* 408 414.

fact that the object of the servitude in this case was to create a trading advantage for the dominant tenement.[281]

Therefore, courts should always consider whether the nature of the trading right is in compliance with the requirements for the establishment of a praedial servitude, as it is arguably always necessary to establish whether these requirements have been satisfied before a praedial servitude can be acknowledged.[282] Courts should apply a critical approach and should only authorise negative praedial trading servitudes when these requirements are fulfilled as it will prohibit undue impediments on land. Another problem that exists is that none of the courts considered any policy concerns when acknowledging negative praedial servitudes in restraint of trade. Courts should be guided by law and policy when making final decisions to ensure that the outcome of the decision will have the effect of balancing the interests of businesses and the public.

An interesting perspective to the question/problem was to consider the approach in Louisiana law. Although Louisiana law acknowledges negative praedial trading servitudes, Lovett and Hotard show that (similar to South African law) most Louisiana judgments rest on cursory legal analyses. This is because courts in Louisiana have the tendency of easily acknowledging negative praedial trading servitudes without thoroughly testing the essential requirements of a praedial servitude. This is a problem that was also illustrated in early South African case law. Similar to De Waal, Hotard also argues that it is important that courts should determine whether agreements in restraint of trade benefit a tenement or merely the interests of a person.[283] It has been suggested that courts in Louisiana should take into consideration whether the dominant tenement has been specifically prepared for a particular trade before acknowledging it as a negative praedial trading servitude in restraint of trade.[284] The land must be permanently dedicated to a single trade.[285] This approach aligns with De

[281] AJ van der Walt "*Novel servitudes Liber Amicorum – Essays in honour of JC Sonnekus Sakereg*" 2017 *Tydskrif vir die Suid-Afrikaanse Reg* 408 414.
[282] MJ de Waal "Die moderne aanwending van grondserwitute: Eiendomsreg en die beheer oor die ontwikkeling van ander saaklike regte" 1995 *Tydskrif vir die Suid-Afrikaanse Reg* 193 210; MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 186.
[283] A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209 1233.
[284] MJ de Waal "Servitudes" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785 797.
[285] BGH 6 July 1939, 161 Entscheidungen des reichgerichts in zivilsachen (RGZ) 90, 1939 (Ger). See AN Yiannopoulous *Louisiana civil law treatise: Praedial servitudes* vol 4 (2015) §6.5; A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209 1237.

Waal's view, German law and is sound with regard to the recognition of negative praedial servitudes in restraint of trade.[286] However, policy concerns exist when negative praedial trading servitudes in restraint of trade are acknowledged. For instance, negative praedial servitudes in restraint of trade have the ability of disrupting efficient markets[287] and have the potential to violate the principle of fair competition in the market place.[288] Even though various policy reasons exist against the acknowledgment of negative praedial servitudes in restraint of trade, an absolute prohibition of such forms of servitudes is also not favourable.[289] In order to accommodate these policy concerns against negative praedial trading servitudes of restraint of trade, I agree with Hotard that negative praedial servitudes in restraint of trade should be administered strictly, namely that negative praedial servitudes of restraint of trade should only be allowed if it is in strict compliance with the *utilitas* requirement. If the creation of praedial servitudes in restraint of trade is restricted by the registration requirement, mandatory provisions as alluded to in chapters 2, 3 and 5, trading servitudes would not pose a significant threat of fragmentation or erosion of landownership in South African law.[290] However, even with the current doctrinal and statutory frameworks in place, it has been illustrated that courts still tend to omit applying the legal principles properly when having to decide whether a restraint of trade agreement has the nature of a praedial servitude. Thus, it is recommended with reference to chapters 2 and 3 that the common law requirements should be applied correctly by courts. These two chapters indicate that trading servitudes can be recognised within our statutory and doctrinal framework. Nonetheless, it was argued that limitations should be implemented regarding the recognition of negative servitudes in restraint of trade. This is because servitudes in restraint of trade create burdens on land that may be onerous in certain cases. Therefore, a legislative framework should be adopted that contains the limitations suggested by Hotard and De Waal. Legislation will force courts to meaningfully engage with the law and it will ensure that the rights of parties (benefitting from the servitude and affected thereby) are balanced in a fair

[286] A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209 1237.
[287] A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209 1239-1240.
[288] A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209 1240.
[289] A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209 1237.
[290] AJ van der Walt "*Novel servitudes Liber Amicorum – Essays in honour of JC Sonnekus Sakereg*" 2017 *Tydskrif vir die Suid-Afrikaanse Reg* 408 415.

and just manner. This would be done by means of incorporating Hotard's proposal into the South Africa's legal system. This would reinforce South Africa's current doctrinal and statutory frameworks as it will provide clear guidance to courts and will force courts to take thorough cognisance of the all the fundamental principles pertaining to servitudes in restraint of trade. In addition, the proposal made by Hotard is very refined, clear-cut and to the point, thus prohibiting any forms of confusion pertaining to whether a particular restraint of trade agreement should be acknowledged as a servitude or not.

The second part of the chapter sought to establish whether personal servitudes in restraint of trade are recognised in South African law. It shows that negative personal trading servitudes with regard to freestanding land has not been officially recognised. However, the Constitutional Court in *Masstores (Pty) Ltd v Pick 'n Pay Retailers (Pty) Ltd* created the impression that restraint of trade clauses embedded in commercial lease agreements are in principle possible as some form of personal servitude. Froneman J asserted that to protect an exclusive right to trade embedded in a lease agreement, the anchor tenant *should have* negotiated for a real right, like a negative personal servitude and not merely a personal right. This indicates that courts would not be too hesitant to acknowledge negative personal servitudes in restraint of trade. However, in a recent judgment, the High Court in *Quest Petroleum (Pty) Ltd v Walters and Another* appears to have taken a different view regarding the recognition of negative personal trading servitudes. It is not clear whether this is because the content of the restraint of trade agreement in *Quest* differed from the agreement in *Masstores* or whether the court in *Quest* meant that restraint of trade agreements should be barred entirely from being recognised as a negative personal servitude. Nevertheless, this dissertation contends that the court in *Quest* erred in its judgment. Negative personal servitudes in restraint of trade should only be recognised provided that the requirements relating to the creation of a limited real right are met.[291] When the

[291] Section 63(1) and 65 of the Deeds Registries Act 47 of 1937; Sections 1 and 2 of the Alienation of Land Act 68 of 1981 requires that rights that are to be registered as limited real rights in land should be transferred in writing; Section 3e(ii) and 6A of the Subdivision of Agricultural Land Act 70 of 1970 impose restrictions on the granting of rights over undivided portions of agricultural land. See AJ van der Walt *The law of servitudes* (2016) 457 and AJ van der Walt "*Novel servitudes Liber Amicorum – Essays in honour of JC Sonnekus Sakereg*" 2017 *Tydskrif vir die Suid-Afrikaanse Reg* 408 414. In *Janse van Rensburg v Koekemoer* 2011 (1) SA 118 (GSJ) paras 15-17 (read with para 19), the court, with reference to *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1918 AD 1 16 and sections 1, 2 of the Alienation of Land Act 68 of 1981, confirmed that a personal servitude is an interest in land and that it therefore constitutes a subtraction from the *dominium* in land. The court also confirmed that any agreement that grants a personal servitude with regard to land should be in writing and ought to be signed by both parties to the agreement to be valid. Furthermore, it should be registered to create the servitude which means that a servitude with regard to land can not be created orally. AJ van der Walt

doctrinal and statutory frameworks as discussed in chapter 2 and the common law requirements for the establishment of a personal servitude are applied to the restraint of trade condition in *Quest*, it is conceivable that the condition does comply with the law and that it could arguably be categorised as a negative personal trading servitude. It is true as mentioned in *Quest*, that a negative personal servitude in restraint of trade cannot be categorised under the traditional categories of personal servitudes. This is because the content of the traditional categories of servitude is irreconcilable with the content of a negative servitude of restraint of trade. However, this does not mean that novel categories of personal servitudes should be prohibited in this context. In South African law, no *numerus clausus* of personal servitudes exists.[292] Therefore, it is possible that a negative servitude in restraint of trade could most likely fall under a novel category of servitude.

The focus of chapter 6 shifts slightly. Whereas the focus of the dissertation thus far was on establishing whether trading rights *can* be recognised as servitudes either praedial or personal, positive or negative, the question in the subsequent chapter will comprise a practical assessment as to whether trading rights *should* be recognised as servitudes. The following chapter will focus on alternative ways of structuring trade agreements, if a servitude agreement as illustrated in chapters 4 and 5 is not the appropriate (or desired) mechanism to structure these agreements and protect these rights.

*The law of servitudes* (2016) 457 footnote 8 points out that the *Janse van Rensburg* case should be compared with ***Felix en 'n Ander v Nortier NO en Andere*** 1994 (4) SA 498 (SE) 500 where the court held that to for a servitude in land to be registrable, it must be intended that the servitude should burden the servient land and not merely the current owner personally. Therefore, a purchaser of the burdened land may be held liable to an unregistered agreement to establish a personal servitude, if there is compliance with the doctrine of notice: *Dhayanundh v Narain* 1983 (1) SA 565 (N).

[292] AJ van der Walt *The law of servitudes* (2016) 460.

# Chapter 6: Alternative ways of structuring trade agreements

## 6 1 Introduction

This chapter will focus on alternative ways of structuring trade agreements. If a servitude agreement as illustrated in chapters 4 and 5 is not the appropriate (or desired) mechanism to structure trade agreements and to protect these rights, the question is whether there are some examples evident from existing case law where trading rights (both positive and negative) were not specifically designed as servitudes. The main purpose of the discussion in this chapter is to determine whether it is desirable, or in fact necessary, to structure these agreements as novel servitudes (even if they may actually comply with the validity requirements as shown in chapters 2 and 3) given the multiple ways in which these agreements have been structured in the past. Although chapters 2, 3, 4 and 5 indicate that it should in theory be possible in terms of basic property law principles to recognise these agreements as limited real rights (and more specifically servitudes, given the specific requirements of praedial and personal servitudes), it is valuable to provide the bigger picture in terms of how these agreements are (or can be) ordinarily structured in South African law.

The first part of the chapter will consider whether a right to trade on another individual's property – the so-called positive trading right – could also be regulated by the law of contract and lease as illustrated by case law.[1] More specifically, the section will question whether the right to trade on someone else's land as regulated by a long-term registered lease agreement may be an alternative mechanism to structuring these positive trading rights as a positive trading servitude (either praedial or personal). In this regard, it will be necessary to briefly discuss the relevant contractual principles applicable to the right to trade on another individual's property and provide some examples in case law where these rights were set up as innominate contracts and lease agreements.

[1] C de Beer *Butterworths business contracts compendium* 1997 (service issue 10 of 2000) 925-946: Agreement of lease of a shop, (996-1016); Agreement of lease of a whole building to be let as a shop or trading store, (1016-1036); Agreement of lease of a building as a factory premises. *Kessler v Krogmann* 1908 TS 291 297-298; *Nel v Abrahams & Sloot* 1911 TPD 24 28; *Potgieter and Another v Minty and Sons and Additional Magistrate Barberton* 1929 TPD 745 753; *South African Railways & Harbours v Springs Town Council* 1949 (2) SA 34 (T).

The second part of the chapter will investigate how restraint of trade agreements are structured as exclusive use covenants embedded in commercial lease agreements as an alternative way to protect the rights of anchor retail tenants in shopping centers against fellow competitors. The origin and development of restrictive covenants will briefly be discussed as a precursor to the investigation into exclusive use covenants, which is a subcategory of restrictive covenants. Landmark case law in both South Africa and in Louisiana[2] regarding exclusive use covenants embedded in commercial lease agreements will also be analysed.[3] The South African Constitutional Court decision of *Masstores (Pty) Ltd v Pick 'n Pay Retailers (Pty) Ltd*[4] is again interesting in this regard as it provides legal certainty to anchor tenants in shopping centers. It illustrates what anchor tenants could do in order to protect their business from competition. The case of the United States Court of Appeals for the Eleventh Circuit *Winn-Dixie Stores Inc et al v Dolgencorp LLC*[5] is in turn also valuable as it shows how the law regarding exclusive use covenants embedded in commercial lease agreements

[2] The reason for selecting Louisiana law as a comparative jurisdiction is for the same reasons as mentioned in chapter 5 part 5 3, namely that Louisiana shares similarities with South African law because both systems have Roman roots and both jurisdictions are mixed. See CG van der Merwe "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363.

[3] Both the South African Constitutional Court decision of *Masstores (Pty) Ltd v Pick 'n Pay Retailers (Pty) Ltd* 2017 (1) SA 613 (CC) and the United States of America's Eleventh Circuit Court decision of *Winn-Dixie Stores Inc et al v Dolgencorp LLC* 746 F3d 1008 (11 Cir 2014) are recent decisions and have a lot in common especially with regard to the facts. The *Winn-Dixie* case is discussed because the case provides an overview of how exclusive use covenants embedded in retail lease agreements are treated within Florida, Louisiana and Mississippi. It shows that Florida recognises exclusive use covenants embedded in lease agreements as real covenants with proprietary effect. On the contrary, it also illustrates the different approach followed in Louisiana where exclusive use covenants embedded in lease agreements do not fit the category of a real right due to Louisiana's civil law tradition. Winn-Dixie was also unsuccessful with the enforcement of the exclusive use covenant in Mississippi because 'strict' privity of estate was lacking. In this regard, see *Winn-Dixie Stores Inc et al v Dolgencorp LLC* 746 F3d 1008 (11 Cir 2014) 1018-1019; 1030-1033. Florida and Louisiana's legal framework will be discussed in this chapter because Florida's legal framework was discussed extensively in Winn-Dixie as most of Winn-Dixie's stores were located in Florida. Seventy-five stores of Winn-Dixie were located in Florida, thirteen stores in Alabama, six stores in Louisiana, and two in Georgia and one in Mississippi. The District Court in *Winn-Dixie* held that Winn-Dixie's exclusive use covenants were enforceable in Alabama and Georgia. However, the District Court applied Florida's legal framework to Georgia and Alabama. The Eleventh Circuit Court reversed and remanded the judgment of the District Court regarding the eleven Alabama stores and the two in Georgia. This is because Florida law requires that the state laws of Alabama and Georgia should be applied to interpret restrictive covenants running with land located in those states, unless the parties consented to the application of Florida law. The record did not indicate that such consent existed. See *Winn-Dixie Stores Inc et al v Dolgencorp LLC* 746 F3d 1008 (11 Cir 2014) 1027. Alabama and Georgia's legal framework pertaining to restrictive covenants will not be discussed as the discussion of Florida's legal system is sufficient to substantiate the importance of recognition or exclusive use covenants embedded in retail agreements as a real right. Florida's stance also corresponds with and substantiates the statement of Froneman J in the South African case of *Masstores*, that exclusive use covenants should be registered as a negative personal servitude to have proprietary effect.

[4] 2017 (1) SA 613 (CC).

[5] 746 F3d 1008 (11 Cir 2014).

in American common law states such as Alabama, Florida and Georgia are regulated differently than a state such as Mississippi and a civil law state such as Louisiana. In this regard, it is noteworthy to consider the alternative ways in which these agreements are structured in various jurisdictions, which is especially interesting for this chapter because it considers different ways of structuring restraint of trade agreements.

## 6 2 Positive trading rights in commercial agreements

### 6 2 1 Introduction

It appears that a right to trade on another individual's property can also be regulated by the principles of the law of contract and lease. Hence, the law of contract and the law of lease in relation to the right to trade on another's land will be discussed in chapter 6 parts 6 2 2 and 6 2 3 as an alternative mechanism for recognising these agreements. Parts 6 2 2 and 6 2 3 will also explain the legal repercussions of categorising the right to trade under the two alternative mechanisms respectively. The question that will be addressed in part 6 2 4 is whether it makes a difference to regulate the incorporeal right to trade on another individual's land in the form of an innominate contract, lease agreement or servitude, and if so; what these differences are? After evaluating the potential advantages and disadvantages of each mechanism, a suggestion will be made regarding the best solution to regulate a right to trade on another individual's land.

### 6 2 2 Innominate contracts

From case law[6] it appears that the right to trade on another individual's property can also be regulated by contractual agreements in the form of an innominate contract. A *contractus innominati* is an expression of Roman law that denotes a contract that has no name.[7] An innominate contract involves a contract in which different rules or set of

[6] *Kessler v Krogmann* 1908 TS 291 297-298; *Nel v Abrahams & Sloot* 1911 TPD 24 28; *Potgieter and Another v Minty and Sons and Additional Magistrate Barberton* 1929 TPD 745 753.
[7] JW Wessels & AA Roberts *The law of contract* (1937) paras 355, 359.

rules apply.[8] It is a unique contract as being one of a kind or *sui generis*.[9] In the law of obligations, contracts are divided into different categories. Each type of contract has its own set of *essentialia* and *naturalia*.[10] The *essentialia* serve as a criterion for the classification of the contract and the *naturalia* determine the consequences of a contract in light of its classification.[11] Only a few contracts are capable of classification.[12] If a contract does not consist of the *essentialia* of any of the acknowledged types of contract, it is regarded as an innominate contract. The consequences of an innominate contract depend exclusively on its own specific terms.[13] Similar to a nominate contract, an innominate contract gives rise to personal rights and not real rights.[14] Whether a contract classifies as nominate or innominate has no specific consequences in South African contract law.[15] All contractual agreements are created in a similar way and may consist of any content irrespective of whether it can be classified as one of the *numerus clausus* of Roman consensual contracts, with the only caveat being that the contractual agreement is not illegal.[16] A question that becomes relevant in this dissertation is whether an innominate contract may be an appropriate vehicle to structure positive trading rights.

The following case demonstrates that a court has in the past regarded an exclusive right to trade on government land as an innominate contract. Furthermore,

---

[8] MFB Reinecke, JP van Niekerk & PM Nienaber "Insurance" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 12 (1) 2 ed (2013) para 90. See also TC Sanders *Institutes of Justinian* 12 ed (1934) 322 "When an agreement did not take the shape of any of the ten forms of contract recognised in the civil law, it was, strictly speaking, not a contract at all; but if one party to it had executed it, the *praetor* would force the other party to execute it also. These contracts, as having no special name, have been termed *contractus innominati*, and as the contract sprang into existence by a thing having been done or given, by the fact, ie, of the contract being already executed by one party to it, these *contractus innominati* may be looked on as belonging more immediately to the head of contracts made *re*".

[9] MFB Reinecke, JP van Niekerk & PM Nienaber "Insurance" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 12 (1) 2 ed (2013) para 90.

[10] ADJ van Rensburg, JG Lotz, T van Rhijn in "Contract" in RH Christie & RD Sharrock (eds) *The law of South Africa* vol 9 3 ed (2015) para 354; *Naturalia* are a set of unexpressed standard terms which apply to each contract falling into a specific category, such as contract of sale, contract of letting and hiring or contracts of service. The standard terms are known as the *naturalia* of a contract and they are terms which arise by operation of law. In other words they will always be read into a contract even though they may never have been contemplated by the parties to the contractual agreement. The *naturalia* of a contract are directory and will apply to a specific contract only in so far as the parties have not agreed on certain aspects. Certain *naturalia* are peremptory.

[11] ADJ van Rensburg, JG Lotz, T van Rhijn in "Contract" in RH Christie & RD Sharrock (eds) *The law of South Africa* vol 9 3 ed (2015) para 354.

[12] ADJ van Rensburg, JG Lotz, T van Rhijn in "Contract" in RH Christie & RD Sharrock (eds) *The law of South Africa* vol 9 3 ed (2015) para 354.

[13] ADJ van Rensburg, JG Lotz, T van Rhijn in "Contract" in RH Christie & RD Sharrock (eds) *The law of South Africa* vol 9 3 ed (2015) para 354.

[14] *De Jager v Sisana* 1930 AD 71 85.

[15] LF van Huyssteen, SWJ van der Merwe & CJ Maxwell *Contract law in South Africa* (2010) 39.

[16] LF van Huyssteen, SWJ van der Merwe & CJ Maxwell *Contract law in South Africa* (2010) 39.

the court held that the right to occupy undefined portions of the land is secondary to the main object of the innominate contract. In *Kessler v Krogmann*[17] the defendant undertook to cede to the plaintiff an unregistered notarial contract, which was previously executed by a traditional leader. The contract conferred on the defendant's predecessors the exclusive right of establishing stores for a period of one hundred years in the traditional leader's township and the right of choosing sites for the necessary buildings which were subject to certain conditions. The predecessors undertook that they would pay the chief £1 during the continuance of the contract when the store or stores were erected.[18] One of the predecessors ceded his rights to the defendant (Krogmann).[19] Krogmann at first carried on a general trading business in the location by himself and subsequently in partnership with his brother, the plaintiff (Kessler).[20] The plaintiff and defendant eventually dissolved their partnership and they executed a deed of settlement. The plaintiff took over the assets of the business and agreed to pay for it in segments. The trading rights formed no portion of those assets.[21] However, the defendant in the third clause of the deed of settlement bound himself to cede to the plaintiff 'the lease or right to trade exclusively in the said location' whenever he was called upon to do so.[22] The plaintiff argued that the mere delivery of the document and a verbal cession of the defendant's rights were insufficient to transfer the right to trade exclusively on the said premises. The plaintiff argued that the document was a lease agreement and that if the contract is a lease of land, the defendant should give cession of the rights in writing or pay the value of the lease and that the plaintiff is entitled to damages for the delay.[23] The plaintiff requested that the cession of the rights should be in writing due to the fact that the defendant's name did not appear on the document. The reason why the defendant could not obtain a formal cession was because it was practically impossible as two of the original predecessors had died years ago and the estate of one of the predecessors had been sequestrated and the third predecessor did not have a sympathetic attitude.[24]

[17] 1908 TS 290 297-298.
[18] *Kessler v Krogmann* 1908 TS 290.
[19] *Kessler v Krogmann* 1908 TS 290 293.
[20] *Kessler v Krogmann* 1908 TS 290 293.
[21] *Kessler v Krogmann* 1908 TS 290 293.
[22] *Kessler v Krogmann* 1908 TS 290 293.
[23] *Kessler v Krogmann* 1908 TS 290 291.
[24] *Kessler v Krogmann* 1908 TS 290 295.

The issue in dispute was whether the rights conferred by the particular document could be validly ceded to the plaintiff by means of a delivery of the document with an intention to transfer or whether a written cession was necessary.[25] The court looked at the substance of the agreement to determine what was really established.[26] The court stated with reference to the Roman-Dutch law authorities that the essentials of a contract of lease entail that there should be an ascertained thing, a fixed rent, which should be paid by the lessee to have the use and enjoyment of the particular thing.[27] It was also held that in this particular case the thing that the predecessors had use of had neither been fixed nor defined in the contract. The predecessors were given the right to erect a store or stores in the township, and there was nothing that prohibited them from erecting stores on various sites. As a result, it was found that the document did not embody a lease agreement but that it exemplified an innominate contract. This is because the object of the agreement was the creation of a monopoly. Furthermore, the granting of use of the premises was secondary to the primary object. The judge was of the opinion that the payment of £1 cannot be regarded as proper rent, nor was it intended that the doctrine of landlord's lien and compensation for improvements could apply (or were intended to apply) to the relationship between the parties.[28] The court pointed out that the general rule of law is that rights may be freely ceded and that no specific form of cession was required.[29] The case therefore shows that where the thing that the individuals have use of is not fixed or defined in the contract, the document will be regarded as exemplifying an innominate contract. The case shows that where the primary object of a right to trade on land is the creation of a monopoly, and the entitlement to use the premises is secondary to the primary object of the contract, the agreement will constitute an innominate contract.

*Kessler* was confirmed in *Nel v Abrahams and Sloot*,[30] which shows that the right to trade on land that incidentally entrenches the right to erect shops, amounts to an innominate contract, and not to a contract in the nature of a lease. In *Nel v Abrahams and Sloot*[31] the court had to determine whether a document conferring a right to erect a shop on a farm and to trade therein amounts to a lease or to an innominate

[25] *Kessler v Krogmann* 1908 TS 290 292.
[26] *Kessler v Krogmann* 1908 TS 290 297.
[27] *Kessler v Krogmann* 1908 TS 290 297.
[28] *Kessler v Krogmann* 1908 TS 290 297-298.
[29] *Kessler v Krogmann* 1908 TS 290 296.
[30] 1911 TPD 24 28.
[31] 1911 TPD 24 28.

agreement. The material facts of the case were in dispute, therefore the court did not proceed to give a judgment in the matter because the legal question at issue had to be settled by way of action, and not by way of motion. However, Wessels J shared interesting views regarding the construct of the document. Wessels J reasoned that although the document said nothing about the owner letting a piece of land to the other party, it appears *prima facie* that when the parties had agreed that a particular piece of land should be occupied by the party to whom the right had been granted, the contract must have been of the nature of a lease.[32] However, Wessels J refuted his aforementioned view, based on the judgment in *Kessler* which states that where one party had given another the right of trading over the farm with a right to erect shops, it was held to be an innominate contract and not a lease agreement.[33] Therefore, the case shows that a right of trading over another's land cannot constitute the essence of a lease agreement but instead, the essence of an innominate contract.

In *Botha and Another v Soocher*,[34] the appellants granted the respondents the sole right to cut timber to enable them to make fruit boxes and for the production of wood, wool and shavings. Furthermore, they were granted the right to erect on the farm the necessary machinery which was required for the cutting of wood and for the making of boxes, to erect offices and storerooms, and to remove the machinery and buildings to different sites from time to time.[35] The period of the agreement entered into between the two parties depended on whether there was sufficient indigenous wood on the farm. The consideration payable was based on the number of boxes produced, a minimum of £50 per month was provided for.

The appellant instituted action in the Magistrate's Court against the respondent.[36] The appellant contended that the agreement entered into between the parties was not a lease agreement in respect of land as it was not notarially executed. However, the Magistrate's Court held that it was a lease of land.[37] The Appellate Division pointed out that the object of the agreement was the disposal of the wood on the farm and that the rights to occupation were merely incidental thereto. Consequently, it could not be regarded as a lease agreement. The court proceeded to mention that if it is not clear

[32] 1911 TPD 24 28.
[33] 1911 TPD 24 28.
[34] 1941 TPD 245.
[35] *Botha and Another v Soocher* 1941 TPD 245.
[36] *Botha and Another v Soocher* 1941 TPD 245.
[37] *Botha and Another v Soocher* 1941 TPD 245 247.

whether the agreement is a lease, the fact that the so-called lessee is given the right to consume a portion of the matter leased is an indication that the contract is probably not a lease but rather a contract of some other kind. In this regard, the appellants placed great reliance on the *Kessler* judgment.[38]

It appears that the aforementioned courts were hesitant to recognise an incorporeal right to trade on another individual's property under a recognised category of contract such as a lease agreement. The court in *Kessler*[39] refused to recognise the incorporeal right as a contract of lease due to the fact that the *essentialia* of a lease agreement was not met because the building to be occupied to carry out the right to trade had not been specified. The courts in *Nel*[40] and *Botha*[41] regarded the right to occupy buildings to exercise a right to trade as secondary to the right to trade and not as the main object of the contract and therefore did not categorise the right to trade on another individual's land as a lease agreement. It appears that the courts might have refused to recognise an incorporeal right to trade on another individual's land as the primary object of a lease agreement because it is not conceivable that an incorporeal right to trade that has the effect of creating a monopoly could be let. Therefore, courts resorted to recognising it as an innominate contract because a *contractus innominati* denotes contracts that have no name.[42] The effect of recognising a contract as a *contractus innominati* is that the consequences of an innominate contract normally depend exclusively on its own specific terms and conditions. Moreover, an innominate contract gives rise to a personal right and not real rights, which means that if the exclusive right to trade over land with the ancillary right to occupy a portion of land to erect a shop, and the ancillary right to occupy the shop is categorised as an innominate contract, the right will only be enforceable *inter partes* (between the landlord and the individual/company using the land for trade purposes) and not against third parties (the landlord's successors in title).[43] The abovementioned cases serve as authority for the fact that courts regard the right to trade on another individual's land as the primary object of an innominate contract; and the right to occupy buildings to carry out the trade as merely incidental to the primary object of the contract.

[38] *Botha and Another v Soocher* 1941 TPD 245 247.
[39] *Kessler v Krogmann* 1908 TS 290.
[40] *Nel v Abrahams and Sloot* 1911 TPD 24.
[41] *Botha and Another v Soocher* 1941 TPD 245.
[42] JW Wessels & AA Roberts *The law of contract* (1937) paras 355, 359.
[43] See chapter 2 2.

The next section, part 6 2 3 will show a development in South African law where South African courts have recognised that a right to trade on another individual's land could be the subject matter of a lease agreement.[44] The ultimate aim of this section is to evaluate whether it is more suitable to construct the right to trade on another individual's land as an innominate contract, lease agreement or a servitude.

### 6 2 3 Lease agreements

A contract of lease, as opposed to a innominate agreement, commences as soon as the parties reach agreement on the following aspects: the property that will be leased, the fact that provisional use and enjoyment of the property will be given to the lessee and the fact that the lessee will have to pay the lessor a determined or determinable amount of rent in respect of the use and enjoyment of the property.[45] If the above mentioned *essentialia* of a lease agreement are not present, the contract will still be valid although it will not constitute a lease agreement.[46] The courts will not be steered by the wording of the contract only, but will determine and give effect to the true intention of the parties.[47] In *South African Railways & Harbours v Springs Town Council*[48] the judge stated that the conception of letting and hiring in South African law is sufficiently wide enough to include a form of contract that confers rights over property (without exclusive control over the land). The case demonstrates that an exclusive right to trade on another individual's land can potentially be the subject matter of a lease agreement. The court correctly found no reason to group this type of agreement among innominate contracts. This is because in essence when a right to trade is exercised, it will arguably always require that the right holder occupy a specific building to exercise

[44] See especially Glover's views in chapter 6 part 6 2 3 regarding *Young v Smith* 1961 (3) SA 793 (T) 797. He mentions that it is not conceivable that the incorporeal right to trade on another individual's land could be let. The right to trade is generally accompanied with the ancillary right to occupy a building on land to enable the holder of the trading rights to exercise her rights. Therefore, technically speaking, what is let is the premises that could only be used for trading purposes.
[45] C Hugo & P Simpson "Lease" in R Zimmerman, D Visser & K Reid (eds) *Mixed legal systems in comparative perspective property and obligations in Scotland and South Africa* (2004) 301 302; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 427-430; K Lehman "Letting and hiring of property" in F du Bois (ed) *Wille's principles of South African law* 9 ed (2007) 906 907; CJ Nagel *Business law* 4 ed (2011) 157; G Bradfield & K Lehman *Principles of the law of sale and lease* 3 ed (2013) 135; G Glover *Kerr's law of sale and lease* 4 ed (2014) 329.
[46] CJ Nagel *Business law* 4 ed (2011) 157.
[47] CJ Nagel *Business law* 4 ed (2011) 157.
[48] 1949 (2) SA 34 (T) 55.

the right in exchange for an amount of rent. In this regard it is clear to see that the requirements for the establishment of a lease agreement are met.

The following case also serves as authority that an exclusive right to trade on land can be classified as a lease agreement, provided that the substance of the contract and the nature thereof complies with the *essentialia* of a lease agreement. In *Young v Smith*,[49] a company purchased portions of a farm from Mr Smith (the deceased spouse of the first respondent). The terms of the deed of sale provided that Smith preserved to himself the right to trade and certain ancillary rights relating to specific areas on the farm. Thereafter, Smith concluded a lease agreement with Sammy which provided Sammy with the trading rights. Sammy's rights were to expire on 30 June 1951. Young (the applicant) also entered into an agreement on 26 September 1950 with Smith, in terms of which Smith granted Young the sole and exclusive option until 4 October 1950, to acquire a lease of all the business and trading rights on and over a portion of the farm under specific terms and conditions. The clause of the preamble to this agreement between Young and Smith, stated that if Smith is not prepared to renew the lease with Sammy, he should grant Young the option to acquire the business and trading rights over the farm on specific terms and conditions. The applicant alleged that he duly exercised the option and accordingly became solely entitled to trade on the farm on 1 July 1951. However, Young became aware that prior to the expiry of Sammy's rights, Smith provided a third party, namely Lingum to exercise the trading rights. Young regarded the agreement between Smith and Lingum as a breach of his agreement with Smith. He instituted legal action against Smith. However, the parties eventually settled the dispute in terms of a deed of settlement. The settlement agreement was that at the expiration of Lingum's rights on 1 June 1961, Young would be entitled to the trading rights over the whole farm. The parties agreed that the terms and conditions of the settlement agreement would be binding on both Smith and Young and their respective successors in title. Smith passed away and the first respondent was appointed as the heiress of Smith's rights. Instead of leasing the trading rights to Young in terms of the agreement between Young and the late Smith, the respondent concluded a lease with another. Young sought relief from the court to enforce his rights in terms of the lease agreement between him and the late Smith. The legal question in the present case was what the object of the contract was between

[49] 1961 (3) SA 793 (T).

Smith and Young. The respondents argued that the lease agreement between Young and Smith was invalid due to the agreement not being executed before a notary public as required in terms of section 29(1) of the Transfer Duty Proclamation, 8 of 1902.[50]

The court held that the applicant arguably was given an exclusive right to trade on the whole farm in return for rental. Therefore, what was let was not corporeal property, but the incorporeal right to trade. Additionally, the court mentioned that no doubt can exist that an incorporeal right can be let.[51] The applicant was let the exclusive right to trade over the whole farm with the ancillary right to occupy a portion of land to erect a shop. The court mentioned that all the essential requirements of a contract of letting and hiring are embodied in the agreement entered into between Smith and Young. The court referred to Roman-Dutch law authority to reach the conclusion that no distinction existed between the agreement entered into between Young and Smith and a contract of letting and hiring. Voet describes a contract of letting and hiring as an exchange of use or work for hire.[52] Grotius in turn describes it as an agreement whereby one party binds himself to let another have the use of something and the other therefore binds himself to pay rent.[53] The court held that the contract of letting and hiring in this case does not fall under the conditions of section 29(1) of the Transfer Duty Proclamation, 8 of 1902.[54] This is because the object of the contract of letting in this case was the exclusive right to trade over the whole farm together with the ancillary right to occupy a specified portion of land to erect a shop; or if the existing building were to remain, the ancillary right to occupy the shop.

Some academic scholars question whether something that is incorporeal can be leased for its use and enjoyment as this seems uncharacteristic of a lease agreement.[55] Glover asserts that even though there is authority that suggests that this is possible,[56] the courts claim that it is possible without seriously investigating what the

[50] 1961 (3) SA 793 (T) 796.
[51] The judge relied on *Graham v Local & Overseas Investments (Pty) Ltd* 1942 AD 95 108.
[52] Voet 19 2 1.
[53] Grotius 3 19 7; *Young v Smith* 1961 (3) SA 793 (T) 797. See *Kessler v Krogmann* 1908 TS 290 297; *De Jager v Sisana* 1930 AD 71 81; *Estate Ishmail v Sayed* 1965 (1) SA 393 (C) 397; *South African Railways & Harbours v Commercial Union Assurance Co of SA Ltd* 1984 (3) SA 251 (N) 254-255; *Oosthuizen v Standard Credit Corporation Ltd* 1993 (3) SA 891 (A) 911. See also K Lehman "Letting and hiring of property" in F du Bois (ed) *Wille's principles of South African law* 9 ed (2007) 906-947 907.
[54] 1961 (3) SA 793 (T) 798.
[55] G Bradfield & K Lehman *Principles of the law of sale and lease* 3 ed (2013) 138; G Glover *Kerr's law of sale and lease* 4 ed (2014) 343.
[56] *D* 7 1 12 2; Voet 19 2 3 (following the Digest); *Graham v Local and Overseas Investments (Pty) Ltd* 1942 AD 95 108; *Young v Smith* 1961 (3) SA 793 (T); *Mergold Beleggings (Edms) Bpk v Bhamjee* 1983 (1) SA 663 (T). See G Glover *Kerr's law of sale and lease* 4 ed (2014) 343.

implications of such a categorisation would be.[57] Glover suggests that it is preferable to construe what was in fact leased in *Young v Smith*[58] not as a incorporeal right to trade, but rather the premises, with a limited purpose in its use and enjoyment because the premises could only be used for the purpose of trading. Furthermore, he proposes that the same would apply to instances where a usufructuary or fideicommissary leases premises over which she has such rights.[59] Glover's views as to what is in fact let, namely the premises, seems more plausible than the views of the court in *Young v Smith*[60] in the sense that what was let was the incorporeal right to trade. Glover's views are plausible because the right to trade is generally accompanied with the ancillary right to occupy a building on land to enable the holder of the trading rights to exercise her rights. Therefore, technically speaking, what is *let* is the premises that could only be used for trading purposes. A more pertinent question for purposes of this dissertation is why one would seek to categorise a right to trade on someone else's land as a lease agreement instead of an innominate contract. The next section will consider the legal effect of categorising a right to trade in the form of a lease agreement as opposed to an innominate contract.

A lease agreement normally creates a contractual obligation that binds the parties to the agreement.[61] It is a reciprocal contract in terms of which the lessor undertakes to provide the lessee with total or partial use and enjoyment of the property. This agreement's duration will depend on the period of time that the contracting properties agreed to. The lessee is obliged to make a payment of a determined or determinable amount for the use of the property. The obligation of the landlord is to provide the tenant with the opportunity to take occupation of the premises. The lessee has to restore the property to the landlord in the same condition it was received,[62] except in

[57] G Glover *Kerr's law of sale and lease* 4 ed (2014) 343.
[58] 1961 (3) SA 793 (T).
[59] *Eksteen v Pienaar* 1969 (1) SA 17 (O); G Bradfield & K Lehman *Principles of the law of sale and lease* 3 ed (2013) 138; G Glover *Kerr's law of sale and lease* 4 ed (2014) 343.
[60] 1961 (3) SA 793 (T).
[61] WE Cooper *Landlord and tenant* 2 ed (1994) 276; C Hugo & P Simpson "Lease" in R Zimmerman, D Visser & K Reid (eds) *Mixed legal systems in comparative perspective property and obligations in Scotland and South Africa* (2004) 301-334 302-308; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 427; K Lehman "Letting and hiring of property" in F du Bois (ed) *Wille's principles of South African law* 9 ed (2007) 906 907; CJ Nagel *Business law* 4 ed (2011) 156; G Bradfield & K Lehman *Principles of the law of sale and lease* 3 ed (2013) 137; S Viljoen *The law of landlord and tenant* (2016) 49.
[62] *Commercial Union Assurance Co of South Africa Ltd v Golden Era Printers and Stationers (Bophuthatswana) (Pty) Ltd* 1998 (2) SA 718 (B). See PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 428.

the circumstances of fair wear and tear.[63] As soon as the tenant occupies the space, it becomes uncertain whether the tenant acquires a personal or real right.[64] The relationship between a lessor and a lessee is normally determined by the parties' original agreement as well as the provisions of the Rental Housing Act 50 of 1999.[65] As a result, their rights and duties are primarily enforceable and binding only mutually between the parties to the contract.[66] However, a lease also has a number of proprietary consequences.[67] For purposes of this discussion, it is important to distinguish between different categories of lease agreements of immovable property as the protection of the lessee will be different in each category. One can draw a distinction between short-form leases (lease agreements for a term less than ten years) and registered or unregistered long-term lease agreements (lease agreements for a term of ten years or longer).[68]

The nature of short-term and unregistered long-term tenants' rights is a contested matter due to the misconceptions in the literature regarding the effect of the *huur gaat voor koop* rule and the effect of the tenants' occupation.[69] Tenants occupying property in terms of short leases are protected by the *huur gaat voor koop* rule due to the fact that these lease agreements are not registered and therefore do not afford such tenants with real rights.[70] The principle of *huur gaat voor koop* provides tenure security

---

[63] *Nedcor Bank Ltd v Withinshaw Properties (Pty) Ltd* 2002 (6) SA 236 (C) 37.
[64] S Viljoen *The law of landlord and tenant* (2016) 49.
[65] PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 427.
[66] Voet 19 2 1 provides that letting and hiring is similar to purchase and sale and therefore it rests on almost the same rules of law. Grotius 3 19 1, on the other hand, emphasises the contractual character of a lease. The principles and rules of the law of contract will apply to the relationship between the landlord and tenant and the extent of their rights and duties depend on the construction of their contract. See C Hugo & P Simpson "Lease" in R Zimmerman, D Visser & K Reid (eds) *Mixed legal systems in comparative perspective property and obligations in Scotland and South Africa* (2004) 301 302-308; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 428 footnote 24.
[67] PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 430.
[68] C Hugo & P Simpson "Lease" in R Zimmerman, D Visser & K Reid (eds) *Mixed legal systems in comparative perspective property and obligations in Scotland and South Africa* (2004) 301 311-312; K Lehman "Letting and hiring of property" in F du Bois (ed) *Wille's principles of South African law* 9 ed (2007) 906 908-909; G Bradfield & K Lehman *Principles of the law of sale and lease* 3 ed (2013) 179-186; S Viljoen *The law of landlord and tenant* (2016) 51; AJ Kerr *The law of sale and lease* 3 ed (2004) 275-285.
[69] S Viljoen *The law of landlord and tenant* (2016) 49. For additional information regarding the common-law rule of *huur gaat voor koop*, see PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 431-434; K Lehman "Letting and hiring of property" in F du Bois (ed) *Wille's principles of South African law* 9 ed (2007) 906 908-909.
[70] S Viljoen *The law of landlord and tenant* (2016) 52; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 431-432; AJ van der Walt *Property in the margins* (2009) 116.

for tenants against successors of the landlord for the agreed duration of the lease agreement. This rule has been developed as an exception to the rule that the personal right of a lessee is only enforceable against the lessor. The main purpose of the rule is to protect tenants' rights with regard to occupation to the extent as provided for in their contractual agreement. Therefore, it is unlikely that this rule could provide a tenant with a real right and the rights created in terms of short-term leases are purely personal, even despite the *huur gaat voor koop* rule. Even though short-term lease agreements provide proprietary protection to a certain extent by means of the *huur gaat voor koop* rule, they are still weaker than a limited real right such as a servitude. Because a limited real right is stronger, one would advocate that the party wishing to trade on another individual's land should at the very least try and secure her right by means of a servitude rather than short-term lease agreement.

Unregistered long-term tenants' rights, in turn are regulated by the Formalities in Respect of Leases of Land Act 18 of 1969.[71] These tenants can enforce their rights for the full duration of the lease against gratuitous successors regardless of whether the successor had prior knowledge of the lease.[72] A gratuitous successor is an individual who has not given any value for the succession such as a donee, legatee or heir.[73] Onerous successors, on the other hand, are individuals who have given value for the succession such as a purchaser.[74] Tenants may enforce their right for the full duration of the lease in terms of section 1(2) of the Formalities in Respect of Leases of Land Act, but only if the onerous successor had knowledge of the lease agreement.[75] If the onerous successor was not aware of the lease agreement, the unregistered long-term tenant will be able to enforce the lease for the first period of 10 years of the existence of the agreement provided that the lessee was in occupation of the leased premises.[76] The function of the doctrine of notice[77] and the *huur gaat voor koop* rule is therefore

[71] S Viljoen *The law of landlord and tenant* (2016) 53.
[72] K Lehman "Letting and hiring of property" in F du Bois (ed) *Wille's principles of South African law* 9 ed (2007) 906 909; G Bradfield & K Lehman *Principles of the law of sale and lease* 2 ed (2010) 105; G Glover *Kerr's Law of sale and lease* 4 ed (2014) 522; S Viljoen *The law of landlord and tenant* (2016) 53. See also *Hitzeroth v Brooks* 1964 (4) SA 443 (E) 447.
[73] G Glover *Kerr's Law of sale and lease* 4 ed (2014) 517.
[74] G Glover *Kerr's Law of sale and lease* 4 ed (2014) 517.
[75] AJ van der Walt & S Maass "The enforceability of tenants' rights: Part II" 2012 *Tydskrif vir die Suid Afrikaanse reg* 228 228-232; S Viljoen *The law of landlord and tenant* (2016) 53.
[76] Section 1 (2) of the Formalities in Respect of Leases of Land Act 18 of 1969; *Hitzeroth v Brooks* 1964 (4) SA 443 (E) 447; G Bradfield & K Lehman *Principles of the law of sale and lease* 3 ed (2013) 105. S Viljoen *The law of landlord and tenant* (2016) 53.
[77] JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 462, 678, 679, 683, 695, 698; CG van der Merwe & A Pope "The law of property, the concept of property and real rights" in F du Bois (ed) *Wille's principles of South African law* 9 ed (2007) 405-444 429; PJ Badenhorst, JM Pienaar & H Mostert

clarified by the Formalities in Respect of Leases of Land Act.[78] Long leases that are unregistered will be enforceable against third parties as subsequent owners of the landlord for the first 10 years by means of the *huur gaat voor koop* rule. However, the rule will only apply if the tenant is in occupation of the premises at the time when the landlord transfers ownership to her new successors in title.[79] If the purchaser was aware of the unregistered lease, protection of the tenant would extend beyond the first 10 years and will protect the tenant for the whole duration of the lease agreement due to the doctrine of notice.[80] Long term, unregistered lease agreements also provide proprietary protection to a certain extent. However, the extent of the protection provided to a tenant of an unregistered long-term lease is dependent on the third parties' knowledge of the contractual agreement. If a third party had no knowledge of the contractual agreement, the tenant may only enforce the right to occupy the building for a period of ten years. In light of this, it appears that a long-term, unregistered lease agreement provides weaker rights than a servitude. Therefore, if the intention of a party wishing to trade on another individual's land is to seek long-term protection with regard to the lease of property, it is submitted that the party should negotiate for a positive trading servitude (which could be either personal or praedial depending on the intention of the respective parties and whether it benefits the land or a natural or juristic person in their personal capacity as illustrated in chapter 3 and 4).

Long-term registered leases are lease agreements with a duration of not less than a period of ten years.[81] A long-term lease agreement also entails an agreement concluded for the natural life of the lessee or for a specific person mentioned in the lease agreement. The agreement is renewable at the will of the lessee for periods which amount to ten years or more, or for indefinite periods.[82] A distinction should be made between registered and unregistered long-term lease agreements.[83] If a long-

*Silberberg and Schoeman's The law of property* 5 ed (2006) 83-85; AJ van der Walt *The law of servitudes* (2016) 91, 92, 95, 175, 179, 284, 300, 376, 381, 383-384, 389, 436, 458, 493, 550, 575-576.

[78] S Viljoen *The law of landlord and tenant* (2016) 53-54.

[79] *Antje Komen v Hendrik de Heer* (1908) 29 NLR 237; *Hitzeroth v Brooks* 1964 (4) SA 443 (E). See also G Bradfield & K Lehman *Principles of the law of sale and lease* 3 ed (2013) 181; S Viljoen *The law of landlord and tenant* (2016) 54.

[80] *Ismail v Ismail* 2007 (4) SA 557 (EC); PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 430-431; S Viljoen *The law of landlord and tenant* (2016) 54.

[81] R Sharrock *Business transactions law* 8 ed (2012) 126; G Glover *Kerr's law of sale and lease* 4 ed (2014) 367; S Viljoen *The law of landlord and tenant* (2016) 52.

[82] PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 430; S Viljoen *The law of landlord and tenant* (2016) 52-53.

[83] Deed Registries Act 47 of 1937, Section 1 (2) of the Formalities in Respect of Leases of Land Act 18 of 1969; S Viljoen *The law of landlord and tenant* (2016) 52.

term lease is registered against the title deed of the property let, it is a limited real right in land and it will be enforceable against any successor or creditor of the lessor.[84] The lessee of the long-term lease agreement will also be protected for the whole duration of the lease against any creditor or successor of the lessor who was aware or unaware of the lease at the time when she entered into the contractual agreement or at the time when she acquired the real right.[85] The lease will be enforceable against third parties regardless of whether the successor in title had knowledge of the lease.[86] If the prescribed formalities are not met, the contract is valid, but ineffective against third parties.[87] The tenant of a long-term lease agreement is protected because of the registration of the lease against the title deed of the leased property,[88] and therefore the doctrine of notice as well as the *huur gaat voor koop* rule is redundant in this particular case. This form of protection (the limited real right) is in accordance with the rules and principles that regulate the acquisition, transfer and exercise of real rights.

The statutory protection afforded to registered long-term lease agreements in terms of tenure security, are stronger than the protection offered in terms of an innominate contract. This is because a registered long-term lease agreement provides a limited real right that is enforceable against third parties regardless of whether those parties had notice of the lease agreement or not. The doctrine of notice and the *huur gaat voor koop* principle eventually becomes inapplicable in the case of a registered long-term lease agreement because registration of the lease agreement against the title deed of the leased property ensures enforceability. Thus, the effect of registration of this particular right is that it will be enforceable against the landlord and the successors in title of the landlord. A question that arises is whether the limited real right will also be enforceable against third party tenants other than the successors of the landlord or property owner. For example, if a third party tenant should deliberately or unintentionally interfere with the original tenant's limited real rights by means of also entering into a contractual agreement with the landlord to exercise trading rights on the

[84] Formalities in Respect of Leases of Land Act 18 of 1969; WE Cooper *Landlord and tenant* 2 ed (1994) 276-277, 281; G Bradfield & K Lehman *Principles of the law of sale and lease* 3 ed (2013) 181; S Viljoen *The law of landlord and tenant* (2016) 52.
[85] G Bradfield & K Lehman *Principles of the law of sale and lease* 3 ed (2013) 181; S Viljoen *The law of landlord and tenant* (2016) 52.
[86] WE Cooper *Landlord and tenant* 2 ed (1994) 276-277, 281; S Viljoen *The law of landlord and tenant* (2016) 53.
[87] AJ Kerr & G Glover "Lease" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 14(2) (2010) para 7.
[88] PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 430; S Viljoen *The law of landlord and tenant* (2016) 53.

premises, the question is what the nature of the original tenant's right is against such a third party. Due to the fact that the status of the original tenant's right is a limited real right, it should arguably be possible for the original tenant to enforce her rights with regard to the property against interfering third party co-tenants and not merely against the landlord and the landlord's successors in title.

The case of *Young* illustrates that even though the lease agreement was not registered in the particular case, the court gave preference and enforceability to the lease contract originally entered into between Young and the deceased. In light of the strong legal protection afforded by registered long-term lease agreements, it is submitted that an individual seeking a right to trade on another individual's land could also in the alternative negotiate for a registered long-term lease agreement apart from opting for a positive trading servitude. Both mechanisms (a servitude and registered long-lease agreement) are suitable to accommodate a right to trade on another's land.

### 6 2 4 Innominate contract, lease agreement or servitude?

Chapter 6 parts 6 2 2 and 6 2 3 have shown various mechanisms under which South African courts are willing to categorise the incorporeal right to trade on another individual's land. This chapter also discussed the legal principles regulating each alternative mechanism extensively to address the question whether it makes a difference to set up the right to trade on another's property in the form of an innominate contract, a lease agreement or a servitude. The subsequent section will briefly summarise the legal repercussions of categorising the right to trade under the three alternative mechanisms respectively. The section will also suggest the appropriate category under which the incorporeal right to trade should be categorised in order to determine how best to structure these types of agreements in future.

It appears from the discussion above that it does in fact make a difference whether an incorporeal right to trade is regulated by an innominate contract, a lease agreement or a servitude. An innominate contract provides a personal right that can only be enforced mutually as opposed to a limited real right, which is enforceable against the landlord and her successors in title as well as interfering co-tenants. A

personal right is weaker than a limited real right.[89] This is because a personal right can only be enforced *inter partes* and not against third parties. Personal rights do not restrict the ownership of land because the object of a personal right is the rendering of a specific performance by the contracting party. In turn, the object of a real right is a thing and is thus stronger. This means, the right holder will have limited real rights with regard to a thing and will be able to enforce her rights *erga omnes*.

Short-term and long-term unregistered lease agreements do provide proprietary protection to a certain extent. The *huur gaat voor koop* principle protects tenants who are parties to a short-term lease contract. The extent of protection provided to a tenant of an unregistered long-term lease is dependent on a third party's knowledge of the contractual agreement. If a third party had no knowledge of the unregistered long-term lease agreement, the tenant may only enforce the right to trade for a period of ten years.

Registered long-term lease agreements certainly provide better protection for a tenant because they are limited real rights that are enforceable against third parties regardless of whether those parties had notice of the lease agreement or not. The doctrine of notice and the *huur gaat voor koop* principle are eventually inapplicable in the case of a registered long-term lease agreement because registration ensures enforceability.

The right to trade on another individual's property can also be regulated by means of a praedial or personal servitude as discussed in chapter 4. A praedial servitude differs from a lease agreement in the sense that a praedial servitude places a burden on the land in perpetuity.[90] However, a praedial servitude will terminate if the *utilitas* requirement is no longer fulfilled as discussed in chapter 3.[91] A positive praedial trading servitude could only be established if the individual trading on the servient tenement is the owner of a dominant tenement that could be served by a servient tenement. In the absence of a dominant tenement, the right to trade on another individual's parcel of land could be registered in favour of the person in her personal capacity in the form of a positive personal trading servitude. A personal servitude and a lease agreement share similarities, for example a beneficiary of a personal servitude may lease her

[89] CG van der Merwe "Things, time, time-sharing and shareblocks" in WA Joubert, JA Faris (eds) *The law of South Africa* vol 27 2 ed (2014) para 60. See chapter 2 part 2 2.
[90] See chapter 3 parts 3 2 2 4 and 3 2 2 5.
[91] See chapter 3 part 3 2 2 5.

contractual entitlements to a third party.[92] In the case of a lease agreement, a lessee may also cede or assign her rights with regard to the lease agreement provided that the lessor and lessee agreed to it contractually.[93] A personal servitude in turn differs from a lease agreement in that a personal servitude is inalienable and terminates at the death of the holder of the servitude.[94] A personal servitude will benefit the servitude holder for the rest of her life as opposed to a registered long-term lease agreement that will only endure for a specified period. The factual needs and intention of a party wishing to trade on another individual's land will ultimately determine the legal construct that should regulate the agreement. Based on the fact that a limited real right is in principle stronger, one would generally advocate that the party wishing to trade on another individual's land should, at the very least, try and secure her right by means of a praedial servitude, personal servitude or a registered long-term agreement rather than standard lease agreements or innominate contracts. If an individual trading on another's land seeks to prohibit direct competition from competitors, such a person may opt for a negative servitude in restraint of trade as discussed in chapter 5 or a restrictive covenant as an alternative mechanism to set up such a right. The next section will discuss and consider whether restrictive covenants could potentially serve as an alternative mechanism to regulate restraint of trade agreements.

[92] *Armstrong v Bhamjee* 1991 (3) SA 195 (A) 201.
[93] G Glover *Kerr's law of sale and lease* 4 ed (2014) 539-540. See also S Viljoen *The law of landlord and tenant* (2016) 137.
[94] *Bhamjee en 'n Ander v Mergold Beleggings (Edms) Bpk* 1983 (4) SA 555 (T).

## 6 3 Restrictive covenants as a mechanism to regulate agreements in restraint of trade

### 6 3 1 Introduction

English law[95] and American law[96] regulate agreements in restraint of trade in the form of real covenants. In these countries, a real covenant is regarded as a servitude.[97] Real covenants originated in English law and were eventually adopted by some common law states in America.[98] The main focus of this part of the chapter is to discuss how exclusive use covenants (personal rights) embedded in lease agreements could be elevated to a real covenant with proprietary effect to restrain commercial competition in shopping centers. It is crucial to understand the fundamental principles and nature of a restrictive covenant to be able to grasp how it is used as a tool to structure an agreement in restraint of trade. Hence, chapter 6 part 6 3 2 will provide a historical background regarding the origin and nature of restrictive covenants in England. In chapter 6 part 6 3 3 the discussion will be narrowed down to how exclusive use covenants, more specifically restraint of trade covenants embedded in lease agreements are elevated to real covenants with proprietary effect in the context of shopping centers.

The reason for discussing restrictive covenants as an alternative mechanism for regulating agreements in restraint of trade, is because restrictive covenants have a precarious nature in South African law. There seems to be agreement that a restrictive covenant creates limited real rights in South African law.[99] However, what is disputed

---

[95] C Harpum, S Bridge & M Dixon *Megarry & Wade The law of real property* 7 ed (2008) para 32-055.
[96] JW Singer *Introduction to property* 2 ed (2005) 289-290. Common law states in America such as Florida regulate agreements in restraint of trade in the form of real covenants. The common law in American states is a constitutionalised version of the common law of England. English settlers carried the common law with them when they settled territories in America that was not controlled by another civilized country. In this regard see *Calvin's case* (1608) 77 ER 397 and C Osakwe "Louisiana legal systems: A confluence of two legal traditions" (1986) 34 *American Journal of Comparative Law Supplement* 29 30. American law pertaining to real covenants in restraint of trade has been influenced by the early English common law; RL Potts "Real covenants in restraint in trade – When do they run with land" (1967) 20 *Alabama Law Review* 114. See also *Winn-Dixie Stores Inc et al v Dolgencorp LLC*746 F3d 1008 (11 Cir 2014) 1018-1019.
[97] C Harpum, S Bridge & M Dixon *Megarry & Wade The law of real property* 7 ed (2008) para 32-055; JW Singer *Introduction to property* 2 ed (2005) 289-290.
[98] *Tulk v Moxhay* 41 Eng Rep 1143 (Ch 1848); RL Potts "Real covenants in restraint of trade – When do they run with the land?" (1967) 20 *Alabama Law Review* 114 115. See also JW Singer *Introduction to property* 2 ed (2005) 233.
[99] J van Wyk *Planning law* 2 ed (2012) 303. See also PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 345-346.

is the category of limited real rights that they constitute.[100] The point of departure has always been that restrictive covenants are servitudes, albeit unique South African servitudes, in that they are regarded as praedial if they are created in favour of other erven, and personal, if they are constituted in favour of a specific person.[101] Van Wyk asserts that this point of departure is partially true.[102] She states that restrictive covenants are indeed unique but that they do not constitute servitudes in the traditional sense of the word.[103] Restrictive covenants were enacted by the original owner of the township as part of a township scheme and registered in the title deeds of all the erven in the scheme.[104] When a covenant is registered, a limited real right is established. However, according to Van Wyk, restrictive covenants should preferably be classified as limited real rights analogous to servitudes[105] or limited real rights *sui generis*.[106] Even though restrictive covenants are recognised as a limited real right in South African law, the practice of using restrictive covenants has essentially become redundant.[107]

Restrictive covenants as it was applied in South African law originates from English law, as shown from the decision in *Elliston v Reacher*.[108] The practice of restrictive covenants was adopted in South Africa during times when owners of townships entered into agreements or covenants with the purchasers of erven in new townships and imposed restrictions on the use of the land. These covenants were imposed by the original township owner as part of a township scheme and they were registered in the title deeds of all the erven in the scheme. The enforcement of these covenants occurred during the period between 1800 and 1910, prior to the enactment of the town planning and townships ordinances of the previous, old provinces.[109] Due

---

[100] J van Wyk *Planning law* 2 ed (2012) 303.
[101] CG van der Merwe *Sakereg* 2 ed (1989) 501.
[102] J van Wyk *Planning law* 2 ed (2012) 303.
[103] J van Wyk *Planning law* 2 ed (2012) 303, 313-316. See also chapter 3 footnote 349 of dissertation for the differences between a restrictive covenant/restrictive condition and a servitude.
[104] J van Wyk *Planning law* 2 ed (2012) 302. For additional examples of restrictive conditions see PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 344-345.
[105] *Gassner and Blumber v Baker* 1931 WLD 23, 25. See J van Wyk *Planning law* 2 ed (2012) 303.
[106] J van Wyk *Restrictive conditions as land-use planning instruments* (1990) 106.
[107] J van Wyk *Planning law* 2 ed (2012) 303.
[108] (1908) 2 Ch 374. In the *Elliston* case it was decided that to qualify as a restrictive covenant, specified requirements had to be met. The land had to be purchased from the original owner of the subdivision; the seller had to lay out the land in lots and enforce restrictions on all the lots; the restrictions had to be for the benefit of all the lots; and the properties had to be purchased from the common seller on the basis that the restrictions were for the benefit of all the other lots in the general scheme. See J van Wyk *Planning law* 2 ed (2012) 302. See also CG van der Merwe *Sakereg* 2 ed (1989) 501-505.
[109] J van Wyk *Planning law* 2 ed (2012) 302.

to the fact that restrictive covenants have mostly became redundant in South Africa, and for the most part only applied in the context of township development, the question is whether it can or should be revived as a mechanism for structuring restraint of trade agreements despite its redundancy in modern South African law. This section will focus primarily on the way in which restrictive covenants have been used in England and the United States of America in order to determine whether South African law could perhaps in future adopt a similar approach to regulate restraint of trade agreements.

### 6 3 2 Historical background of restrictive covenants

English land law draws a distinction between easements,[110] restrictive covenants and *profits á prendre*.[111] In English land law, all three legal instruments could be said to comprise the law of 'servitudes' even though restrictive covenants are more recent in origin than the other forms and have certain distinctive features.[112] Covenants and easements are treated differently in English law as there are many detailed differences between the effect of a covenant and the effect of an easement especially in the way in which they are extinguished.[113] A covenant may be positive or negative in that it can

[110] An easement can be a positive or negative right to derive some kind of limited benefit for the dominant tenement by allowing the owner to do something on the servient tenement or that prohibits the owner of the servient tenement in her use of the servient tenement for the benefit of the dominant tenement. The characteristics of an easement were set out in *Re Ellenborough Park* (1956) Ch 131 (CA). Compare B Akkermans & W Swadling "Types of property rights – immovable and movables (Goods)" in S van Erp & B Akkermans (eds) *Cases, materials and text on property law* (2012) 211 319-329; K Gray & SF Gray *Elements of land law* 5 ed (2009) para 5 1 4; C Harpum, S Bridge & M Dixon *Megarry & Wade The law of real property* 7 ed (2008) para 27-004; C Sara *Boundaries and easements* 5 ed (2011) para 10 03; Law Commission Law Com No 327: *Making land work: Easements, covenants and profits á prendre* (2011) paras 2 18-2 19, 2 21, 2 22.

[111] A *profit á prendre* is different from an easement in the sense that it is not required to be connected to a dominant tenement. Granting a beneficiary limited use of the servient tenement and authorising the beneficiary to take the natural produce of parts or the whole of the servient tenement such as minerals or turf that is capable of being owned at the time when it is removed. See B Akkermans & W Swadling "Types of property rights – immovable and movables (Goods)" in S van Erp & B Akkermans (eds) *Cases, materials and text on property law* (2012) 211 319-329; K Gray & SF Gray *Elements of land law* 5 ed (2009) para 5 1 4; C Harpum, S Bridge & M Dixon *Megarry & Wade The law of real property* 7 ed (2008) para 27-043; C Sara *Boundaries and easements* 5 ed (2011) para 10 09; Law Commission Law Com No 327: *Making land work: Easements, covenants and profits á prendre* (2011) para 2 31. See also AJ van der Walt *The law of servitudes* (2016) 61.

[112] K Gray & SF Gray *Elements of land law* 5 ed (2009) para 5 1 2; C Harpum, S Bridge & M Dixon *Megarry & Wade The law of real property* 7 ed (2008) para 27-002. C Sara *Boundaries and easements* 5 ed (2011) paras 11-06 – 11-11 distinguishes easements from covenants, *profits á prendre* and servitudes. See AJ van der Walt *The law of servitudes* (2016) 60.

[113] C Sara *Boundaries and easements* 5 ed (2011) para 11 06. In English law a covenant is no more than a contract that emerges by deed. The use of covenants with regard to land has led to a large body of law whereby the benefit of covenants can be annexed to the land and the burden of covenants may pass in equity with the land. Easements, on the other hand, are expressed in terms of rights of the dominant tenement over adjacent land. Covenants are expressed in terms of obligations imposed on

require something to be done or prevent something from being done on the servient tenement for the benefit of the dominant tenement. For purposes of this section, light will only be shed on negative restrictive covenants. These types of covenants are relevant for this chapter because in English law (and in some common law states in America), servitudes in restraint of trade are enforceable as negative restrictive covenants in land.[114] It is therefore necessary to determine how these rights are structured in these jurisdictions in order to determine whether they provide viable alternatives to restraint of trade agreements.

Traditionally covenants could only run with land in English law if the original covenanting parties had a simultaneous relationship to land called 'privity of estate'.[115] The historical restriction on the utility of the covenant has been the fact that, by virtue of the rule of privity, contracts only conferred enforceable benefits and burdens upon the original contracting parties *inter partes*.[116] The effect of the technical privity rules was to only allow covenants embedded in lease agreements to be binding on assignees (a person to whom a right or liability is legally transferred or a person appointed to act for another)[117] and not to enforce covenants contained in a deed of sale on subsequent land owners. The law of covenants initially reflected the traditional rule of contractual privity, which sought to 'curtail the losses of destructive bargaining' by placing long-term burdens on land.[118] Equity courts in England eventually relaxed the rigidity of the rules and allowed enforcement of the covenants in deeds against subsequent owners of land provided that they had notice of the restriction when obtaining possession.[119] In English law, purely contractual regulations designed to

---

the servient tenement. Due to the fact that covenants should always be contained in a deed, such obligations cannot emerge by means of prescription. In English law, only a few negative easements exist such as the right of support and the right of light. These easements usually arise by prescription. See also South African law where academic scholars such as Jeannie van Wyk and André van der Walt regard restrictive covenants as a *sui generis* limited real right and not as a servitude per se. J van Wyk *Planning law* 2 ed (2012) 315-317; AJ van der Walt *The law of servitudes* (2016) 75.

[114] C Harpum, S Bridge & M Dixon *Megarry & Wade The law of real property* 7 ed (2008) para 32-055; compare chapter 6 footnote 209. See also AJ van der Walt *The law of servitudes* (2016) 150. Even though the origin of restrictive covenants has its roots in English law and even though servitudes in restraint of trade is acknowledged in English law in the form of a real covenant, this chapter will not focus on English law pertaining to agreements in restraint of trade. This chapter will more specifically focus on the law of Florida and Louisiana in light of the fact that an interesting more recent case reflects how exclusive use covenants (personal covenant) embedded in lease agreements can be elevated to a real covenant in restraint of trade with proprietary effect.

[115] JW Singer *Introduction to property* 2 ed (2005) 233.

[116] K Gray & SF Gray *Elements of land law* 5 ed (2009) para 3 3 3.

[117] C Soanes & A Stevenson *Concise Oxford English dictionary* 11 ed revised (2006) 79.

[118] RA Epstein "Covenants and Constitutions" (1988) 73 *Cornell Law Review* 906 914. See also K Gray & SF Gray *Elements of land law* 5 ed (2009) para 3 3 3.

[119] MP Thompson *Modern land law* 5 ed (2012) 580.

protect the commercial and environmental value of land went beyond the frame of contract and could find enforcement, in equity against third parties.[120] This revolutionary development transformed contractual agreements into a source of proprietary entitlement. Due to the fact that the innovation was achieved by courts of equity, the proprietary right generated by the doctrinal change was classified as equitable. The remarkable development in English law of covenants is generally associated with the landmark decision in *Tulk v Moxhay*.[121]

Restrictive covenants will only function as property rights that may pass to successors in title of the benefited land if it complies with the conditions as set out in *Tulk v Moxhay*.[122] In this case the landowner, Mr Tulk had sold land at Leicester Square to a purchaser who promised that he would not build on the Leicester Square and that it would be maintained in a form as a public 'pleasure ground'.[123] In 1808, the individual who purchased Leicester Square from the plaintiff had notice of the restrictive covenant which was contained in the deed. Forty years after the original agreement, the property was eventually sold to the defendant. The defendant sought to build on the land and the square. The plaintiff consequently sought an injunction to prohibit the defendant from any form of construction. The legal question was whether a covenant restricting the use of property could be enforced against a subsequent purchaser. The court held that a restrictive covenant will only have proprietary effect if the covenant is negative or restrictive of land use, if it relates to an identifiable dominant tenement, if it benefits or accommodates the dominant tenement; and if it has been intended that it will run with the covenantor's land.[124] Gray and Gray specifiy that the effect of the decision in *Tulk v Moxhay* [125] on third-party enforcement has become more clearly demarcated and restricted.[126] This is because restrictive covenants will only be of a proprietary nature if it benefits or accommodates the dominant tenement. Restrictive covenants

[120] K Gray & SF Gray *Land law* 6 ed (2009) para 3 059. See also C Harpum, S Bridge & M Dixon *Megarry & Wade The law of real property* 7 ed (2008) para 32 001.
[121] (1848) 2 Ph 774; CG van der Merwe "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2 ed (2010) 576.
[122] (1848) 2 Ph 774; CG van der Merwe "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2 ed (2010) 576. See also K Gray & SF Gray *Elements of land law* 5 ed (2009) 259-260, 261-264; K Gray & SF Gray *Land law* 6 ed (2009) 129-131.
[123] (1848) 2 Ph 774 775.
[124] *Tulk v Moxhay* (1848) 2 Ph 774; K Gray & SF Gray *Elements of land law* 5 ed (2009) paras 3 4 16 - 3 4 19. See also AJ van der Walt *The law of servitudes* (2016) 61.
[125] (1848) 2 Ph 774; CG van der Merwe "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2ed (2010) 576.
[126] K Gray & SF Gray *Elements of land law* 5 ed (2009) para 3 4 28 - 3 4 31; C Harpum, S Bridge & M Dixon *Megarry & Wade The law of real property* 7 ed (2008) para 32-044. See AJ van der Walt *The law of servitudes* (2016) 150.

should not merely provide a personal benefit for the restrictive covenant holder.[127] These legal principles are similar to the establishment requirements for the creation of a praedial servitude in South African law as illustrated in chapter 3. The court held that the principle of equity[128] would enforce the restrictive covenant against subsequent successors in title of the covenantor if such a successor had notice of the restrictive covenant.[129] The underlying principle of the case is that if an individual sold land with a restriction for a lower price than he would have demanded if the land was not burdened, equity would not enable the grantee to defeat the covenant and get a full price for the land just because it was conveyed to another.[130] The basis of the decision is that if a purchaser buys land with the relevant notice of a prior undertaking pertaining to the land that it will be inequitable for him to act in a way that is inconsistent with that obligation.[131]

Thompson cautions that the decision of *Tulk v Moxhay* if interpreted in such broad terms would lead to the enforcement of all kinds of different obligations against successive owners of land.[132] This effect is something that English law has traditionally rejected because this would make certain land burdened by such covenants inalienable. Thompson asserts that even though *Tulk v Moxhay* is regarded as the

---

[127] K Gray & SF Gray *Elements of land law* 5 ed (2009) para 3 4 28 - 3 4 31.

[128] The origin of the English law of real property is the common law itself. In this context, 'common law' means the law that was applied to the country as a whole by the courts of the king. The centralized judicial system that was established in the reign of Henry II led to the creation of a body of new and uniform rules. The new rules were developed by the decisions of the judges in particular cases. Centralised records were kept and a systematic body of doctrine eventually began to develop. The term 'common law' as understood in English law came to mean the ordinary judge made law of the three central royal courts, namely the King's Bench, Common Pleas and Exchequer. Some interests were not protected by the courts of common law but were protected by the Chancellor. The Chancellor was the royal official who dispensed the Crown's residuary powers of redressing wrong. He devised remedies for cases where due to non-compliance with formality, the result at common law would not have been equitable. It was in this context that 'common law' came to be contrasted with 'equity'. Rights recognised by the common law were known as rights at common law or legal rights. Rights that was enforced by the Chancellor, but not at common law were named rights in equity or 'equitable rights'. The Chancellor always proceeded on grounds of equity or good conscience. He would provide remedies where justice in the case required some tempering of the rigour of common law. Equity eventually developed into a separate branch of the legal system. The characteristics of equitable rights led to the distinction between legal and equitable interests in land that was adopted as the foundations of the reforms of 1925 pertaining to land with unregistered title. Even though common law and equity are distinct concepts, a modern trend exists to minimize these distinctions. With regard to the registration of title, the distinction has little importance. C Harpum, S Bridge & M Dixon *Megarry & Wade The law of real property* 7 ed (2008) paras 1 014 - 1 015.

[129] *Tulk v Moxhay* 41 Eng Rep 1143 (Ch 1848); RL Potts "Real covenants in restraint of trade – When do they run with the land?" (1967) 20 *Alabama Law Review* 114 115.

[130] *Tulk v Moxhay* 41 Eng Rep 1143 (Ch 1848); RL Potts "Real covenants in restraint of trade – When do they run with the land?" (1967) 20 *Alabama Law Review* 114 115.

[131] MP Thompson *Modern land law* 5 ed (2012) 580.

[132] MP Thompson *Modern land law* 5 ed (2012) 580.

foundation of modern English law regarding restrictive covenants, the rationale of the judgment is not that a multitude of different obligations could become enforceable against successive owners of land merely because these owners have notice of the original agreement. If this should happen it could make land inalienable due to the burdens placed on it. Courts have been tentative and cautious to create new interests in land. Therefore, in English law, a restrictive covenant will only run with land if the individual seeking to enforce the covenant retains land (a dominant tenement) that will benefit from the covenant.[133] Furthermore, the land retained should actually benefit from the covenant.[134] This implies two aspects, namely that the covenant should touch and concern the land and the two plots of land should be sufficiently proximate to each other for the dominant tenement to be benefited. Furthermore, it is not necessary that restrictive covenants entered into by two landowners should always create an interest in land binding upon successors in title to the covenantor.[135] This is because the covenant may also be intended to be of a personal nature. A covenant will only be regarded as being binding on the parties' successors in title if the parties had intended for it to be so and if it complies with the requirement that the dominant tenement will be benefited. Furthermore, a restrictive covenant will only be binding on successors in title if the covenant had been registered.[136] If it is registered, all subsequent purchasers will be deemed to have actual notice of the covenant and will therefore be bound by it.[137]

The application of the rules pertaining to restrictive covenants derived from *Tulk v Moxhay* indicates that when a burden such as a restrictive covenant has run with land, a particular purchaser will be bound by it.[138] English law holds that the successor in title of the original covenantee, seeking to enforce the covenant must establish that the benefit of the covenant has passed to her under the equitable rules.[139] If this cannot

[133] MP Thompson *Modern land law* 5 ed (2012) 581-582; B McFarlane, N Hopkins & S Nield *Land law text, cases and materials* 2 ed (2012) 973-974. This rule is exemplified by the judgments in *Formby v Barker* (1903) 2 Ch 539 and *London County Council v Allen* (1914) 3 QB 642.
[134] MP Thompson *Modern land law* 5 ed (2012) 582; B McFarlane, N Hopkins & S Nield *Land law text, cases and materials* 2 ed (2012) 974-979.
[135] MP Thompson *Modern land law* 5 ed (2012) 582.
[136] MP Thompson *Modern land law* 5 ed (2012) 583.
[137] Section 198 of the Law of Property Act 1925. See also MP Thompson *Modern land law* 5 ed (2012) 583.
[138] MP Thompson *Modern land law* 5 ed (2012) 584.
[139] See *Re Union of London & Smith's Bank Conveyance*, *Miles v Easter* (1933) Ch 611. See also MP Thompson *Modern land law* 5 ed (2012) 584.

be proven, the legal position will be that no one exists to enforce the covenant.[140] In such a case, even if the restrictive covenant has been registered, the register may be altered to remove the entry relating to the burden of the covenant.[141]

A few courts in the United States of America adopted the doctrine as established in *Tulk v Moxhay*, which enforces covenants in equity even though the covenants might not run with the land.[142] The reason behind this is to give effect to the public policy of protecting residential areas and commercial business investments by making real covenants more flexible tools for land use planning.[143]

In America, restrictions on land use that are intended to run with land are called 'covenants' or 'servitudes'.[144] If disputes arise pertaining to the initial agreement, it is regulated by general rules of contract. However, if a dispute arises with regard to the enforceability of a covenant by a successor in title of the benefited tenement or enforceable against a successor in title of the burdened land, the rules of real covenants will regulate the dispute.[145] Covenants are initially created and regulated in accordance with the law of contract and therefore it starts out as a personal right.[146] If a personal covenant meets certain prescribed criteria as established by common law, it can be transformed into a proprietary interest and will be regarded as a real covenant. The covenant should be in writing, it should be intended by the original parties to bind and benefit the successors in title and it should touch and concern the land. A

---

[140] *Seymour Road South Hampton Ltd v Williams* (2010) EWHC 111 (Ch). See also MP Thompson *Modern land law* 5 ed (2012) 584; B McFarlane, N Hopkins & S Nield *Land law text, cases and materials* 2 ed (2012) 986.

[141] *Southwark Roman Catholic Diocesan Corporation v South London Church Fund & Southwark Diocesan Board of Finance* (2009) EWHC 3368 (Ch). See also MP Thompson *Modern land law* 5 ed (2012) 584.

[142] *Tulk v Moxhay* 41 Eng Rep 1143 (Ch 1848); RL Potts "Real covenants in restraint of trade – When do they run with the land?" (1967) 20 *Alabama Law Review* 114 115. 'Privity of estate' is a mutual relationship to similar rights in property. The English law courts regard the 'privity of estate' requirement as satisfied if a tenurial relationship exist between the parties to a covenant. Most American courts apply relaxed privity tests. See HR Williams "Restrictions on the use of land: Covenants running with the land at law" (1949) 27 *Texas Law Review* 419 440 for a classification of the different American tests. See also JW Singer *Introduction to property* 2 ed (2005) 233.

[143] RL Potts "Real covenants in restraint of trade – When do they run with the land?" (1967) 20 *Alabama Law Review* 114 115-116.

[144] JW Singer *Introduction to property* 2 ed (2005) 231 footnote 3.

[145] Historically, three sets of rules developed to regulate the dispute, namely the law of easements, the law of real covenants and the law of equitable servitudes. Efforts have been made by the *Restatement (Third) of Property (Servitudes)* (2000) to unify the three types of rights. However, many courts still treat the three sets of rules differently. See JW Singer *Introduction to property* 2 ed (2005) 231.

[146] TD Marsh & S Szwarc "Transforming lease covenants into real covenants: Lessons from *Winn-Dixie v Dolgencorp*" (2015) 29 *Probate and Property Magazine* 35 36.

successor in title will only be bound by a real covenant if she acquired the property interest with actual or constructive notice of the burden.

Now that the origin, nature and legal effects of a real covenant have been established, the discussion will be narrowed down more specifically to the American case of *Winn-Dixie Stores Inc v Dolgencorp LLC*.[147] This case practically illustrates how common law states such as Florida, use exclusive use covenants embedded in retail lease agreements as a tool to protect an anchor tenant from direct competition in shopping centers. Florida's doctrinal framework regulating restraint of trade agreements will be briefly discussed as a precursor to the discussion of *Winn-Dixie*.

### 6 3 3 Transforming exclusive use covenants into real covenants

Retailers renting space in multitenant buildings have the need to be situated near other businesses that appeal to a similar customer base.[148] Other retail tenants may want to take an opposite approach and may desist from being situated in close proximity to their competitors.[149] These tenants usually ensure that the landlords of these multi-tenant buildings (shopping centers) agree to refrain from leasing space available to competitors by inserting provisions in lease agreements.[150] These provisions embedded in lease agreements are referred to as 'exclusive use covenants' in light of the fact that the landlord promises that the tenant will have the exclusive right to participate in a specific type of business.[151] A covenant is a synonym for a promise or agreement.[152] It is a promise in writing where parties agree to take action or to refrain from taking action.[153] In written contracts such as lease agreements, covenants begin

[147] 746 F3d 1008 (11 Cir 2014).
[148] TD Marsh "Because of Winn-Dixie: The common law of exclusive use covenants" (2015) 69 *University of Miami Law Review* 935 939.
[149] TD Marsh "Because of Winn-Dixie: The common law of exclusive use covenants" (2015) 69 *University of Miami Law Review,* 935 939.
[150] PJ Sturtevant "Restrictive covenants in shopping center leases" (1959) 34 *New York University Law Review* 940-952; ME Rosendorf & J Reynolds Seidman "Restrictive covenants – The life cycle of a shopping center" (1998) 12 *Probate and Property* 33-38; EB Halper "Supermarket use and exclusive clauses" (2001) 30 *Hofstra Law Review* 297 459.
[151] TD Marsh "Because of Winn-Dixie: The common law of exclusive use covenants" (2015) 69 *University of Miami Law Review* 935 940. See also JN Brown "Use provisions in commercial leases" (01-2006) Los Angeles Lawyer <https://www.lacba.org/docs/default-source/lal-back-issues/2006-issues/january-2006.pdf> 21 (accessed 23-02-2019).
[152] TD Marsh "Because of Winn-Dixie: The common law of exclusive use covenants" (2015) 69 *University of Miami Law Review* 935 937.
[153] TD Marsh "Because of Winn-Dixie: The common law of exclusive use covenants" (2015) 69 *University of Miami Law Review* 935 937.

as 'personal covenants'.[154] Personal covenants are creatures of the law of contract, which make them personal rights. They are binding on the original parties who entered into the contractual agreement and if it is authorised in terms of the contractual agreement, the covenant may also bind the successors in title and assignees of the original parties to the agreement.[155]

A real covenant in turn is a specific type of covenant that concerns real property.[156] Real covenants may bind the successors in title of the original parties to the agreement, more broadly than a personal covenant.[157] In English and American common law systems, real covenants are servitudes.[158] Exclusive use covenants found in lease agreements are personal covenants and are potentially eligible to be elevated to the status of 'real covenants' if the covenant relates to the use of real property in that it touches or concerns the land.[159] The rules relating to the interpretation of these covenants are moulded by both the law of contract and the law of property.[160] Real covenants differ from personal covenants with regard to remedies. In the case of a breach of a real covenant, the traditional remedies are equitable relief, specific performance or injunctive relief.[161] Monetary damages or specific remedies set out in the contract will ordinarily be provided in the case of a breach of a personal covenant.[162]

*Winn-Dixie Stores Inc v Dolgencorp LLC*[163] illustrates that in terms of Florida's legal framework an exclusive use covenant embedded in a registered commercial

---

[154] *Caulk v Orange Cnty* 661 So 2d 932, 933-934 (Fla Dist Ct App 1995). See TD Marsh "Because of Winn-Dixie: The common law of exclusive use covenants" (2015) 69 *University of Miami Law Review* 935 937.

[155] TD Marsh "Because of Winn-Dixie: The common law of exclusive use covenants" (2015) 69 *University of Miami Law Review* 935 938.

[156] S French "Servitudes reform and the new restatement of property: Creation doctrines and structural simplification" (1988) 73 *Cornell Law Review* 928 950.

[157] TD Marsh "Because of Winn-Dixie: The common law of exclusive use covenants" (2015) 69 *University of Miami Law Review* 935 938.

[158] S French "Toward a modern law of servitudes: Reweaving the ancient strands" (1982) 55 *Southern California Law Review* 1261 1261-1262; TD Marsh "Because of Winn-Dixie: The common law of exclusive use covenants" (2015) 69 *University of Miami Law Review* 935 938.

[159] TD Marsh "Because of Winn-Dixie: The common law of exclusive use covenants" (2015) 69 *University of Miami Law Review* 935 943.

[160] S French "Toward a modern law of servitudes: Reweaving the ancient strands" (1982) 55 *Southern California Law Review* 1261 1269-1270; TD Marsh "Because of Winn-Dixie: The common law of exclusive use covenants" (2015) 69 *University of Miami Law Review* 935 938.

[161] TD Marsh "Because of Winn-Dixie: The common law of exclusive use covenants" (2015) 69 *University of Miami Law Review* 935 939.

[162] TD Marsh "Because of Winn-Dixie: The common law of exclusive use covenants" (2015) 69 *University of Miami Law Review* 935 938. See also A Schwartz "The case for specific performance" (1979) 89 *Yale Law Journal* 271 271-272.

[163] 746 F3d 1008 (11 Cir 2014).

lease agreement will automatically be elevated to a real covenant. The factual background of the case is as follows: Winn Dixie Stores was an anchor tenant in a shopping center and its leases always included an exclusive use covenant in restraint of trade.[164] The aim of the exclusive use covenant was to prohibit other competing tenants in the shopping center from selling specific grocery items in competition with Winn-Dixie.[165] To ensure that the exclusive clause is a property right enforceable against third parties, Winn-Dixie's lease agreements expressly stipulated that the clause will be regarded as a covenant that will run with the land.[166] In addition, Winn-Dixie recorded its leases in the public registry to provide notice to the public regarding the existence of the clause.[167] Winn-Dixie brought suit to enforce this covenant against third party tenants that are situated in Winn-Dixie anchored shopping centers in Florida, Georgia, Alabama, Mississippi and Louisiana.[168] The District Court found significant differences between the laws of Louisiana,[169] Mississippi[170] and Alabama, Florida and Georgia.[171] Therefore, the court analysed the issue in dispute separately under each of these jurisdictions. The court had to determine whether the nature of the exclusive use covenant embedded in the lease agreements created a real right that could be enforced against third party tenants.

It should be noted that Winn-Dixie as anchor tenant usually records a 'short form lease'. The lease agreement customarily recites an exclusive use covenant stipulating that the landlord promises that the anchor tenant will have the exclusive right to operate a supermarket in the shopping center, that it will not lease any property located within the shopping center for occupancy as a supermarket, nor will the landlord permit any

[164] *Winn-Dixie Stores Inc v Dolgencorp LLC* 746 F 3d 1008 (11 Cir 2014) 1015; AG McBride "The need for legislative authorization of noncompete servitudes in commercial leases" (2017) 61 *Loyola Law Review* 325 326.
[165] *Winn-Dixie Stores Inc v Dolgencorp LLC* 746 F 3d 1008 (11 Cir 2014) 1016. See also AG McBride "The need for legislative authorization of noncompete servitudes in commercial leases" (2015) 61 *Loyola Law Review* 325 326.
[166] *Winn-Dixie Stores Inc v Dolgencorp LLC* 746 F 3d 1008 (11 Cir 2014) 1016. AG McBride "The need for legislative authorization of noncompete servitudes in commercial leases" (2015) 61 *Loyola Law Review* 325 326-327.
[167] *Winn-Dixie Stores Inc v Dolgencorp LLC* 746 F 3d 1008 (11 Cir 2014); AG McBride "The need for legislative authorization of noncompete servitudes in commercial leases" (2015) 61 *Loyola Law Review* 325 326-327.
[168] *Winn-Dixie Stores Inc v Dolgencorp LLC* 746 F 3d 1008 (11 Cir 2014) 1020-1027, 1030-1033.
[169] *Winn-Dixie Stores Inc v Big Lots Stores Inc* 886 F Supp 2d (SD Fla 2012) 1338.
[170] *Winn-Dixie Stores Inc v Big Lots Stores Inc* 886 F Supp 2d (SD Fla 2012) 1338-1339.
[171] *Winn-Dixie Stores Inc v Big Lots Stores Inc* 886 F Supp 2d (SD Fla 2012) 1336-1338. See also *Winn-Dixie Stores Inc v Dolgencorp LLC* 746 F 3d 1008 (11 Cir 2014) 1015-1016.

tenant to sublet any part to a person engaged in any such business.[172] In this particular case, Winn-Dixie's exclusive use covenant precluded landlords from renting to other tenants operating grocery stores in the same shopping center. The covenant specified that such tenants may devote only a limited 'sales area' to certain restricted products.[173] Interestingly enough, Winn-Dixie's exclusive use covenant was not worded as a burden on land (such that the shopping center will not be used for the sale of grocery items) but it was worded as a restriction on the landlord's behaviour.[174] Generally, a beneficiary of an exclusive use (personal) covenant may sue the landlord for violation of the covenant.[175] However, no beneficiary of an exclusive use covenant has a direct cause of action against a third party tenant for the violation of the exclusive use (personal) covenant. A third party tenant can only be sued for the violation of the covenant if the exclusive use covenant is real, in other words, if it specifically touches and concerns the land. The covenant in this particular case did not specifically address whether the covenant is intended to be enforced against the landlord, third-party retailers, or both. However, Winn-Dixie averred that the aggregate effect of its exclusive use covenant is that when the covenant is recorded properly in the short form lease, the covenant will *automatically* be transformed into a real covenant, which will be enforceable against other tenants who signed leases after Winn-Dixie.[176] In this regard, the District Court applied the general principles of the law of Florida, which stipulates that a covenant will be regarded as valid and enforceable if the covenant touches and concerns the land, if the original parties to the agreement had the intention that the covenant should run with the land and if there is notice of the constraint on the part of the party against whom enforcement is sought.[177] The District Court found that the exclusive use covenants did touch and concern the land due to the fact that each exclusive use covenant intended to restrict or forbid the sale of specific items by the

[172] *Winn-Dixie Stores Inc v Dolgencorp LLC* 746 F 3d 1008 (11 Cir 2014) 1016. See TD Marsh "Because of Winn-Dixie: The common law of exclusive use covenants" (2015) 69 *University of Miami Law Review* 935 949.
[173] *Winn-Dixie Stores Inc v Dolgencorp LLC* 746 F 3d 1008 (11 Cir 2014) 1016.
[174] TD Marsh "Because of Winn-Dixie: The common law of exclusive use covenants" (2015) 69 *University of Miami Law Review* 935 965-969; TD Marsh & S Szwarc "Transforming lease covenants into real covenants" (2015) 29 *Probate and Property Magazine* 35 40. See *Winn-Dixie Stores Inc v Dolgencorp LLC* 746 F 3d 1008 (11 Cir 2014) 1016.
[175] TD Marsh & S Szwarc "Transforming lease covenants into real covenants" (2015) 29 *Probate and Property Magazine* 35 37.
[176] *Winn-Dixie Stores Inc v Dolgencorp LLC* 746 F 3d 1008 (11 Cir 2014) 1016; TD Marsh "Because of Winn-Dixie: The common law of exclusive use covenants" (2015) 69 *University of Miami Law Review* 935 949-950; TD Marsh & S Szwarc "Transforming lease covenants into real covenants" (2015) 29 *Probate and Property Magazine* 35 37.
[177] *Winn-Dixie Stores Inc v Big Lots Stores Inc* 886 F Supp 2d (SD Fla 2012) 1337.

other co-tenants in the shopping center.[178] The intention of the original parties to the agreement was that the covenant should run with the land. Furthermore, the court found that the defendants had implied notice of the exclusive use covenant.[179]

Marsh criticises the District Court and the Eleventh Circuit judgments because both courts did not satisfactorily address how a personal covenant could be transformed into a real covenant.[180] The District Court held that the exclusive use personal covenant was transformed into a real covenant that was binding on third party retailers because the lease agreement contained a statement that '[e]ach provision hereof shall be deemed both a covenant and a condition and shall run with the land'.[181] Therefore, the defendants presumably had constructive notice of the exclusive use covenant because it was recorded in the lease agreement.[182] It is important to take note that the Winn-Dixie exclusive use covenant was not worded as a restriction on land, instead it was worded as a restriction on the landlord's behavior. The covenant also did not explicitly address whether the restriction would be enforceable against the landlord, third-party retailers or both.[183] The courts failed to address the wording of the Winn-Dixie covenant and merely concluded that the personal covenant had been somewhat *magically* transformed into a real covenant because the covenant ran with the land and was therefore enforceable against third parties.[184] The legal implication of courts elevating personal covenants into real covenants automatically without analysing whether the wording of the particular exclusive use covenant is in compliance with the establishment criteria for a restrictive covenant is arguably that it casts the net too wide and will lead to a proliferation of burdens on land.

---

[178] *Winn-Dixie Stores Inc v Big Lots Stores Inc* 886 F Supp 2d (SD Fla 2012) 1337. See also discussion of case in TD Marsh "Because of Winn-Dixie: The common law of exclusive use covenants" (2015) 69 *University of Miami Law Review* 935 952.

[179] *Winn-Dixie Stores Inc v Big Lots Stores Inc* 886 F Supp 2d (SD Fla 2012) 1337. See discussion of case in TD Marsh "Because of Winn-Dixie: The common law of exclusive use covenants" (2015) 69 *University of Miami Law Review* 935 952. The District Court refused to grant orders of injunctions for thirty-seven of the stores as it held that no violation of the covenant terms occurred. With regard to seventeen of the other stores, the District Court granted injunctive relief which had the effect of restricting only the sale of food items measured by shelving space.

[180] TD Marsh "Because of Winn-Dixie: The common law of exclusive use covenants" (2015) 69 *University of Miami Law Review* 935 965.

[181] *Winn-Dixie Stores Inc v Big Lots Stores Inc* 886 F Supp 2d 1337 (2012). See TD Marsh "Because of Winn-Dixie: The common law of exclusive use covenants" (2015) 69 *University of Miami Law Review* 935 965.

[182] *Winn-Dixie Stores Inc v Big Lots Stores Inc* 886 F Supp 2d 1338 (2012).

[183] TD Marsh "Because of Winn-Dixie: The common law of exclusive use covenants" (2015) 69 *University of Miami Law Review* 935 968.

[184] TD Marsh & S Szwarc "Transforming lease covenants into real covenants" (2015) 29 *Probate and Property Magazine* 35 40.

Therefore, it is submitted that exclusive use covenants should be drafted correctly because if it is poorly constructed it could cause problems for landlords and tenants.[185] An exclusive use covenant will be well-drafted if it complies with the following:[186] Firstly, it must define the goods or services that may be sold exclusively by the tenant in a narrow and precise way. Secondly, it should address the relationship between the exclusive use covenant and the existing lease agreements of other tenants. Thirdly, it should define the region in which the goods or services are restricted to. Fourthly, it should define the duration period for which the covenant will operate. In the fifth place, it should explicitly stipulate the exceptions to the restrictive use, if any, by specifying the businesses that are permitted to operate within the shopping center or it should specify clearly that some competitors should not exceed a specified threshold of shelf space. Finally, it should also address whether anchor tenants or department stores will be exempt from the restrictions.

In light of the fact that in Florida exclusive use covenants are automatically elevated to a real covenant provided that certain criteria are met, the first question that needs to be addressed is whether an exclusive use covenant embedded in a commercial long-term registered lease agreement could (or should) be automatically elevated to the status of a limited real right in the South African context. In South African law a registered long-term lease of immovable property, confers on the lessee a limited real right in another's property.[187] A lessee of a long-term lease agreement will at all times enjoy protection for the whole duration of the lease agreement. Moreover, registered long-term lease agreements are enforceable against any successor or creditor of the lessor.[188] It does not matter whether the creditor or successor of the lessor was aware of the lease at the time when the contractual agreement was entered into. The lease will be enforceable against third parties regardless of whether the successor in title had knowledge of the lease agreement.[189]

---

[185] TD Marsh "Because of Winn-Dixie: The common law of exclusive use covenants" (2015) 69 *University of Miami Law Review* 935 940.
[186] TD Marsh "Because of Winn-Dixie: The common law of exclusive use covenants" (2015) 69 *University of Miami Law Review* 935 941.
[187] A long-term lease agreement may be constituted as a limited real right by registration. See section 1(2)(a) (b). Prescription Act 68 of 1969. See also H Mostert, JM Pienaar & J van Wyk "Limited real rights in land" in WA Joubert & JA Faris (eds) vol 14 part 1 *The law of South Africa* (2010) para 33.
[188] Formalities in Respect of Leases of Land Act 18 of 1969; WE Cooper *Landlord and tenant* 2 ed (1994) 276-277, 281; G Bradfield & K Lehman *Principles of the law of sale and lease* 3 ed (2013) 181; S Viljoen *The law of landlord and tenant* (2016) 52.
[189] WE Cooper *Landlord and tenant* 2 ed (1994) 276-277, 281; S Viljoen *The law of landlord and tenant* (2016) 53.

The tenant of a long-term lease agreement will be protected based on the registration of the lease against the title deed of the leased property.[190] The question that emerges with regard to South African law is whether an exclusive use covenant embedded in a registered long-term lease agreement is sufficient as an alternative mechanism to afford adequate protection to an anchor tenant against interfering third party tenants (competitors).

In the South African judgment of *Masstores (Pty) Ltd v Pick 'n Pay Retailers (Pty) Ltd*[191] it was confirmed that an exclusive use covenant (personal right) embedded in a lease agreement should be specifically structured as a negative personal servitude to protect the anchor tenant from any direct competition by other third party co-tenants in the shopping center. It should be duly noted that the lease agreement in this particular instance was not registered. In this regard, it is questionable whether it would have made a difference if the lease agreement was registered. Would the anchor tenant in the *Masstores* case have been protected purely on the basis that the lease agreement was registered? It is doubtful that an anchor tenant would be protected on the mere registration of a long-term lease agreement. This is because the primary purpose of a registered long-term lease agreement is to provide a tenant with tenure security against the landlord and the landlord's successors in title.[192] Tenure security in these circumstances is enforceable against the lessor or any creditor or successor of the lessor. In light of the specific protection afforded by a registered long-term lease agreement it is doubtful whether an exclusive use covenant embedded in a registered long-term lease agreement could automatically be elevated to a limited real right. It appears that an exclusive use covenant will remain a personal right irrespective of the fact that the lease agreement has been registered. Therefore, it is submitted that it necessary for an exclusive use covenant to be registered specifically as a negative personal servitude or a restrictive covenant to elevate its status from a personal right to a limited real right. This submission is in alignment with Froneman J's statement in *Masstores*.[193] Froneman J's statement is important because the fact that the covenant has to be specifically structured as a negative personal servitude will ensure that the doctrinal and statutory frameworks regarding the creation of limited real rights are

[190] PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 430; S Viljoen *The law of landlord and tenant* (2016) 53.
[191] 2017 (1) SA 613 (CC).
[192] See *Boshoff v Theron* 1940 TPD 299; RH Christie & GB Bradfield *Christie's the law of contract in South Africa* 6 ed (2011) 481.
[193] 2017 (1) SA 613 (CC).

adhered to before a novel limited real right is created. In turn this will also prevent the creation of a proliferation of burdens on land. The central question that needs to be addressed is whether restrictive covenants should be revived in South African law as an alternative mechanism to regulate agreements in restraint of trade in light of the fact that restrictive covenants are used as a tool to regulate restraint of trade agreements in foreign jurisdictions. Even though a restrictive covenant is not regarded as a servitude in South African law, it is regarded as a limited real right.

There are many similarities between the legal construct of a servitude as applied in South African law and the legal construct of a restrictive covenant as applied in England and Florida. For example, the establishment requirements for restrictive covenants as discussed above in parts 6 3 3, are similar to the establishment requirements for the creation of a negative praedial servitude in restraint of trade in South African law as discussed in chapters 3 and 5. My submission is that even though restrictive covenants are more than capable of accommodating restraint of trade agreements in South African law, it could be argued that it is not necessary for these legal constructs to be revived as an alternative mechanism to set up a restraint of trade agreement in South African law. This is because the category of servitudes is sufficient to set up a restraint of trade agreement. The protection offered by a servitude is adequate and more importantly, similar to the protection offered by a restrictive covenant. Therefore, it is submitted in light of *Masstores* that an exclusive use covenant should be specifically registered as a negative personal servitude to enable the anchor tenant to enforce its rights against interfering third party co-tenants.

Interestingly enough, unlike the legal outcome of *Winn-Dixie* in Florida, the District Court and Courts of Appeal refused to enforce the exclusive use covenant of Winn-Dixie in Louisiana due to the fact that Louisiana is a mixed civil law system. Louisiana state law requires more than 'a clearly expressed intention' that the covenant should run with the land for a right to be real.[194] Parties who contractually agree that the contract will run with the land do not inevitably create real rights. The court in *Winn-Dixie* relied on *U-Serve Petroleum & Invs Inc v Cambre*[195] to substantiate this outcome.

[194] *Winn-Dixie Stores Inc v Dolgencorp LLC* 746 F 3d 1008 (11 Cir 2014) 1030-1031. See also A McBride "The need for legislative authorization of noncompete servitudes in commercial leases" (2015) 61 *Loyola Law Review* 325 339-346; A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209 1220-1221.

[195] 486 So 2d 821 824 (La Ct App 1986); *Winn-Dixie Stores Inc v Dolgencorp* 746 F 3d 1008 (11 Cir 2014) 1030-1031,

In order for a covenant to be regarded as running with the land (creating a real obligation) in Louisiana, it can only be established in the form of a title deed document that transfers rights in property. A real right in terms of civil law should be apparent (or visible) from the title deed document. The court relied on *Leonard v Lavigne*,[196] to support this premise. In Louisiana, a lease contract is not regarded as a title deed document. Therefore, it cannot give rise to a real obligation because in the case of *Richard v Hall*,[197] it was held that 'under the civil law concept, a lease does not convey any real right or title to the property leased, but only a personal right.' Therefore, Winn-Dixie could not enforce the exclusive use covenant in restraint of trade in Louisiana as lease agreements only establish personal rights.[198] In terms of Louisiana law, the reason why this jurisdiction invalidates non-compete servitudes in commercial lease agreements is based on the technicality that an anchor tenant does not own a dominant tenement.[199] The Louisiana Civil Code states that only the owner of a dominant tenement may acquire a praedial servitude in restraint of trade.[200] Louisiana courts only acknowledge negative praedial servitudes in restraint of trade. As a result, lessees such as Winn-Dixie will never be able to enforce a servitude in restraint of trade in terms of Louisiana law because they do not own a dominant tenement. Louisiana courts classify lease agreements as contracts that establish only personal rights and obligations.[201] An embedded restraint of trade agreement in a commercial lease agreement is regarded as a personal obligation in terms of Louisiana law.[202] The classification of a restraint of trade agreement embedded in a lease agreement as a

[196] 162 So 2d 341 343 (La 1964); *Winn-Dixie Stores Inc v Dolgencorp LLC* 746 F 3d 1008 (11 Cir 2014) 1031.
[197] 874 So 2d 131 145 (La 2004); *Winn-Dixie Stores Inc v Dolgencorp LLC* 746 F 3d 1008 (11 Cir 2014) 1031.
[198] The court cites *Leonard v Lavigne* 162 So 2d 343 (La 1964) (The court refused to find a covenant running with the land when a lease provision restricted the operation of a competing petrol station which was located on the adjacent property), *Wolfe v N Shreveport Dev Co* 228 So 2d 148 149-151 (La Ct App 1969) (where the court refused to find that the covenant ran with the land when a provision in the lease prohibited the operation of other shoe stores in the shopping arcade), *U-Serve Petroleum & Invs Inc v Cambre* 486 So 2d 824 (La Ct App 1986) (The court held that even if the contract in dispute stipulated that the agreement should run with the land, it still remains a personal contract between the two parties because it favoured the person of U-Serve and not the dominant tenement), *Winn-Dixie Stores Inc v Dolgencorp LLC* 746 F 3d 1008 (11 Cir 2014) 1031.
[199] Article 735 of the Louisiana Civil Code Annotation (2008). See also AG McBride "The need for legislative authorization of noncompete servitudes in commercial leases" (2017) 61 *Loyola Law Review* 325 357.
[200] AG McBride "The need for legislative authorization of noncompete servitudes in commercial leases" (2017) 61 *Loyola Law Review* 325 332.
[201] *Richard v Hall* 874 So 2d 131 145 (La 2004). See also A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209 1220-1221.
[202] *Leonard v Lavigne* 162 So 2d 342, 343 (La 1964); *Winn-Dixie Stores Inc v Dolgencorp LLC* 746 F 3d (11 Cir 2014) 1031. See also A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209 1220-1221.

personal obligation means that agreements in restraint of trade will always be enforceable only against the landowner who signed the contract. Personal obligations are not usually enforceable against third parties such as fellow lessees. Third parties will only be bound if they expressly assume in writing, the obligations of the original obligor, namely the owner of the land.[203] Furthermore, the Eleventh Circuit in *Winn-Dixie* relied on the rationale that commercial lease contracts are not appropriate instruments by which to create real rights in Louisiana.[204] Louisiana's stance is understandable given the role of the *numerus clausus* principle in that jurisdiction. South Africa in turn does not have a *numerus clausus* in the context of limited real rights and, as discussed in chapter 2, novel categories of limited real rights can be created provided that it complies with the statutory and doctrinal frameworks for the creation of a limited real right. In chapter 5 it was also shown that it is conceivable for a restraint of trade agreement to be classified as a negative praedial or personal servitude. Therefore, no reason exists why such an agreement that is embedded in a commercial lease agreement cannot be established as a servitude. I am of the view that it is conceivable, and indeed possible, that exclusive use covenants embedded in lease agreements could be elevated to a real right either by means of a restrictive covenant or a negative personal servitude provided that the relevant requirements for the creation of a limited real right as discussed in chapter 2 and 3 are met. The nature of an exclusive use covenant is that it does subtract from the landlord's *dominium* if one takes into consideration the subtraction from *dominium* test as applied in *Ex parte Geldenhuys*,[205] *Lorentz v Melle and Others*[206] and *Pearly Beach Trust v Registrar of Deeds*[207] to determine whether a right is real or personal. When an anchor tenant negotiates with the landlord of a shopping center for an exclusive use covenant to be enforceable against third party co-tenants, it constitutes a burden upon the land and it

[203] *Leonard v Lavigne* 162 So 2d 343 (La 1964); *SPE FO Holdings LLC v Retif Oil & Fuel LLC* No 07-3779 2008 WL754716 1 (ED La Mar 19 2008). See A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209 1220-1221.
[204] *Winn-Dixie Stores Inc v Dolgencorp LLC* 746 F 3d (11 Cir 2014) 1030; AG McBride "The need for legislative authorization of noncompete servitudes in commercial leases" (2015) 61 *Loyola Law Review* 325 338.
[205] 1926 OPD 155.
[206] *Lorentz v Melle and Others* 1978 (3) SA 1044 (T); AJ van der Walt "Personal rights and limited real rights: A historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *Tydskrif vir Heedendaagse Romeins-Hollandse Reg* 170 195-196.
[207] *Pearly Beach Trust v Registrar of Deeds* 1990 (4) SA 614 (C); AJ van der Walt "Personal rights and limited real rights: A historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *Tydskrif vir die Heedendaagse Romeins Hollandse Reg* 170 170-172; MJ de Waal "*Numerus clausus* and the development of new real rights in South African law" (revised version of a paper read at staff seminars at the University of Nijmegen on 21 June 1999 and Maastricht University on 22 June 1999).

curtails the rights of the owner in the physical sense as the landlord will be prohibited from leasing units to any company. Irrespective of the fact that the common law and statutory law in general disfavour restraints on competition, exclusive use covenants in commercial lease agreements have become an essential part of the retail real estate industry.[208] From the perspective of competition law, it could be argued that the nature of exclusive use covenants stir up anti-competitiveness and may contravene the Competition Act 89 of 1998.[209] This is because the existence of exclusive use covenants make it difficult for small competing companies to enter retail sectors that are affected by these covenants.[210] Coetzee and Mackenzie correctly mention that if competition between similar stores is prohibited in a shopping center, consumers may be denied the opportunity of lower prices, better product quality, variety and the innovation that is driven by rivalry. However, even though these covenants are not always favoured, the existence of these exclusive use covenants are also important. The rationale behind these legal constructs will be discussed below.

### 6 3 5 The importance of embedding restraint in trade agreements in commercial leases

McBride is of the view that the court in *Winn-Dixie* applied an inappropriate legal framework with regard to Louisiana by holding the view that an exclusive use covenant did not create a real right that could be enforced against Winn-Dixie's co-tenants in

---

[208] TD Marsh "Because of Winn-Dixie: The common law of exclusive use covenants" (2015) 69 *University of Miami Law Review* 935 941-942.

[209] J Coetzee "Greater clarity needed on exclusive lease agreements in grocery retail sector" (06-07-2017) Commercial Property News <http://www.bizcommunity.com/Article/196/567/164327.html> (accessed 23-10-18). The South African Competition Commission initiated the Grocery Retail Market Inquiry (GRMI) to find clarity on the problems pertaining to evaluate the anti-competitive practices in the South African grocery retail sector. One of the controversial issues that the GRMI is investigating are the concerns that these lease agreements may contravene the Competition Act especially where supermarkets may have market power.

[210] J Coetzee "Greater clarity needed on exclusive lease agreements in grocery retail sector" (06-07-2017) Commercial Property News <http://www.bizcommunity.com/Article/196/567/164327.html> (accessed 23-10-18). The South African Competition Commission initiated the Grocery Retail Market Inquiry (GRMI) to find clarity on the problems pertaining to evaluate the anti-competitive practices in the South African grocery retail sector. One of the controversial issues that the GRMI is investigating are the concerns that these lease agreements may contravene the Competition Act especially where supermarkets may have market power.
N Mackenzie "Exclusive leases with anchor tenants in South Africa" (25-06-2014) Competition Chronicle <https://www.competitionchronicle.com/2014/06/exclusive-leases-with-anchor-tenants-in-south-africa/> (accessed 23-10-2018).

Louisiana.[211] She states that the Eleventh Circuit's judgment depicts a deficiency in Louisiana law.[212] As it has been discussed above, in Louisiana an anchor tenant such as Winn-Dixie is not able to enforce an exclusive use covenant in restraint of trade in a lease agreement in the form of a real property right. McBride argues that this is problematic especially if one takes into consideration the value of restrictive use covenants in commercial lease agreements and the plan of New Orleans Mayor Mitch Landrieu to increase tax revenues by aiming to attract 'big-box' retailers.[213] McBride provides the following reasons to support her view that anchor tenants such as supermarkets in shopping centers should be able to embed restraint of trade agreements in commercial leases. Firstly, it increases benefaction in shopping centers.[214] The anchor tenant protects the financial sustainability of the shopping center as it provides the essential bulk of customer traffic to the shopping center.[215] Banks will arguably not agree so readily to finance the opening of a shopping center in the case where the landlord has not secured an anchor tenant.[216] Anchor tenants such as supermarkets form the pillar of shopping centers because they create jobs for residents living near the shopping centers and thus provide a source of tax returns for local economies.[217] Therefore, McBride argues that restraint of trade agreements should be embedded in commercial lease agreements as they are vital to the economic endurance of shopping centers.[218] These agreements will ensure that anchor tenants can limit direct competition to enable the survival of the particular business. These agreements are valuable when they are in the form of a contractual right, however, they become even more valuable if they are enforced as a servitudal right. This is

[211] AG McBride "The need for legislative authorization of noncompete servitudes in commercial leases" (2017) 61 *Loyola Law Review* 325 327-328.
[212] AG McBride "The need for legislative authorization of noncompete servitudes in commercial leases" (2017) 61 *Loyola Law Review* 325 328.
[213] AG McBride "The need for legislative authorization of noncompete servitudes in commercial leases" (2017) 61 *Loyola Law Review* 325 328.
[214]AG McBride "The need for legislative authorization of noncompete servitudes in commercial leases" (2017) 61 *Loyola Law Review* 325 352. For arguments for and against exclusive lease agreements, see also N Mackenzie "Exclusive leases with anchor tenants in South Africa" (25-06-2014) Competition Chronicle <https://www.competitionchronicle.com/2014/06/exclusive-leases-with-anchor-tenants-in-south-africa/> (accessed 23-10-2018).
[215] *Hornwood v Smith's Food King* No 1 772 P 2d 1284 1286 (Nev 1989); Footnote 175 in AG McBride "The need for legislative authorization of noncompete servitudes in commercial leases" (2017) 61 *Loyola Law Review* 325 353.
[216] AG McBride "The need for legislative authorization of noncompete servitudes in commercial leases" (2017) 61 *Loyola Law Review* 325 353.
[217] AG McBride "The need for legislative authorization of noncompete servitudes in commercial leases" (2017) 61 *Loyola Law Review* 325 353.
[218] AG McBride "The need for legislative authorization of noncompete servitudes in commercial leases" (2017) 61 *Loyola Law Review* 325 355.

because a servitudal right is a real right and is of a more permanent nature as it binds the landlord's successors in title as well as other lessees in the shopping center.[219] Thus, the anchor tenant can enforce the servitude directly against a violating co-tenant. The effect of being able to enforce the servitude directly against a co-tenant is simpler and more efficient than having to go through the process of enforcing the terms of the exclusive use covenant against the landlord.[220]

Due to the fact that the servitude binds the successors in title of the lessor, transaction costs associated with the renegotiation of restraint in trade agreements can be avoided when the shopping center is sold to a new purchaser.[221] The anchor tenant's lease agreement must be recorded in order for the restraint in trade servitude to be effective against third parties. Forthcoming co-tenants will therefore have advance notice of the existence and parameters of the servitude. Co-tenants will arguably avoid violating the terms of the servitude and in this way harmful competition will be prevented before it begins.[222] Furthermore, a registered covenant will respect the contractual intent of the landlord and the tenant.[223] Instead of making a formalistic analysis of the question whether the benefit of a negative servitude of restraint of trade affects the economic interest of the beneficiary, the court in *Whitinsville*[224] considered the merits of allowing negative servitudes in restraint of trade to run with land and discussed the role such covenants play in land development and business investment.[225] It also considered the unfairness of giving a windfall to the subsequent owner, who violates the negative servitude in restraint of trade, by depriving the business owner of the right to enforce the covenant benefit that was bargained for.[226]

---

[219] AG McBride "The need for legislative authorization of noncompete servitudes in commercial leases" (2017) 61 *Loyola Law Review* 325 355-356.
[220] AG McBride "The need for legislative authorization of noncompete servitudes in commercial leases" (2017) 61 *Loyola Law Review* 325 355-356.
[221] AG McBride "The need for legislative authorization of noncompete servitudes in commercial leases" (2017) 61 *Loyola Law Review* 325 356.
[222] AG McBride "The need for legislative authorization of noncompete servitudes in commercial leases" (2017) 61 *Loyola Law Review* 325 356.
[223] AG McBride "The need for legislative authorization of noncompete servitudes in commercial leases" (2017) 61 *Loyola Law Review* 325 356.
[224] *Whitinsville Plaza Inc v Kotseas* 390 NE 2d 243 (Mass 1979); S French "Can covenants not to sue, covenants against competition and spite covenants run with land? Company results under the touch or concern doctrine and the Restatement third, property (servitudes)" (2003) 38 *Real Property, Probate & Trust Journal* 267 282.
[225] S French "Can covenants not to sue, covenants against competition and spite covenants run with land? Company results under the touch or concern doctrine and the Restatement third, property (servitudes)" (2003) 38 *Real Property, Probate & Trust Journal* 267 282.
[226] *Whitinsville Plaza Inc v Kotseas* 390 NE2d 243 (Mass 1979) 249; S French "Can covenants not to sue, covenants against competition and spite covenants run with land? Company results under the

Developers and businesses invest large amounts of money in creating a specific business on a parcel of land and would want to ensure that other nearby parcels of land will not be used by direct business competitors. As long as future purchasers of land have notice by means of public records of the existence of these restrictions, such covenants ought to be enforceable against future owners of the estate.

According to McBride the legal position in Louisiana that a covenant in restraint of trade embedded in a lease agreement has no real effect should change.[227] She argues that the law as currently applied in Louisiana frustrates the contractual intent of the landlord and tenant as well as the tenant's reliance interest. Therefore, a court should enforce an agreement where the landlord and tenant agree that the restraint in trade clause should run with the land.[228] Co-tenants affected by these agreements should have no foundation to stand on when complaining about the enforcement of these clauses as they should arguably have checked the public records to determine whether such restrictive servitudes exist. Therefore, co-tenants should not complain because in actual fact they will enjoy more customer traffic when they are located in a shopping centre together with a well-known anchor tenant.[229] On this basis McBride proposes the adoption of a statute that will address the problem and that will provide Louisiana courts with statutory authority to uphold servitudes in commercial lease agreements provided that the restraint of trade agreement satisfies specific requirements.[230] McBride explains that the theory of optimal standardisation holds that the reason for the judiciary's unwillingness to acknowledge novel property rights is because of concerns that novel property rights would have the effect of imposing information measurement costs on third-parties.[231] Because of the unwillingness of the

---

touch or concern doctrine and the Restatement third, property (servitudes)" (2003) 38 *Real Property, Probate & Trust Journal* 267 282.

[227] AG McBride "The need for legislative authorization of noncompete servitudes in commercial leases" (2017) 61 *Loyola Law Review* 325 357.

[228] AG McBride "The need for legislative authorization of noncompete servitudes in commercial leases" (2017) 61 *Loyola Law Review* 325 357.

[229] AG McBride "The need for legislative authorization of noncompete servitudes in commercial leases" (2017) 61 *Loyola Law Review* 325 357.

[230] AG McBride "The need for legislative authorization of noncompete servitudes in commercial leases" (2017) 61 *Loyola Law Review* 325 357-358.

[231] AG McBride "The need for legislative authorization of noncompete servitudes in commercial leases" (2017) 61 *Loyola Law Review* 325 358. See also TW Merrill & HE Smith "Optimal standardization in the law of property: The *numerus clausus* principle" (2000) 110 *Yale Law Journal* 1 10-11 and JA Lovett "Title conditions restraint of trade" in VV Palmer & EC Reid (eds) *Mixed jurisdictions compared private law in Louisiana and Scotland Edinburgh Studies in Law Volume 6* (2006) 30 34-35. Merrill and Smith allege that when persons interact with objects concerning property rights, they encounter information processing costs when detecting whether a property right exists and when assessing the implications of the property right. When property rights are standardized it reduces the information processing casts

judiciary in Louisiana to expand the *numerus clausus* principle by incorporating novel proprietary rights, McBride explains that the legislature is in the best position to introduce changes to the *numerus clausus* principle.[232] Another benefit of legislating novel proprietary rights is because rules incorporated in legislation are more visible than law created by the judiciary.[233] Furthermore, statutory provisions are inherently universal in that they have an 'unambiguous domain' when applied within a state whereas law created by the judiciary may only be applicable to a specific set of facts. Legislation also brings about change more rapidly. When the refined suggestions and restrictions proposed by McBride are entrenched in legislation, it will ensure that the rights of all parties affected are equally balanced. Once rules pertaining to novel property rights are incorporated into legislation, information costs that are associated with the creation of novel property rights will be reduced as market participants will know the rules that will apply to them.[234]

McBride's arguments pertaining to the importance of exclusive use covenants and the reasons for legislating the rules are convincing and very useful in the South African legal context as well. I am of the opinion that due to the anti-competitive concerns regarding exclusive use covenants embedded in lease agreements, it is important to develop a legal framework in South Africa that will also accommodate the interests of third party co-tenants. As argued by Yiannopolous[235] and the court in *SPE FO Holdings LLC v Retif Oil & Fuel LLC*,[236] restraint of trade agreements have the potential of affecting the economy in a negative manner.[237] Therefore, this part of the chapter argues that a balance should be struck between the interests of the anchor tenant and third-party retailers. Equity would be achieved if the exclusive use covenant

---

faced by people. If the creation of novel property rights is allowed it will create additional risks and uncertainties for other participants in the market.

[232] McBride relies on TW Merrill & HE Smith "Optimal standardization in the law of property: The *numerus clausus* principle" (2000) 110 *Yale Law Journal* 1 60-61. See AG McBride "The need for legislative authorization of noncompete servitudes in commercial leases" (2017) 61 *Loyola Law Review* 325 358.

[233] TW Merrill & HE Smith "Optimal standardization in the law of property: The *numerus clausus* principle" (2000) 110 *Yale Law Journal* 1 61-62. See also AG McBride "The need for legislative authorization of noncompete servitudes in commercial leases" (2017) 61 *Loyola Law Review* 325 358.

[234] TW Merrill & HE Smith "Optimal standardization in the law of property: The *numerus clausus* principle" (2000) 110 *Yale Law Journal* 1 62. See AG McBride "The need for legislative authorization of noncompete servitudes in commercial leases" (2017) 61 *Loyola Law Review* 325 359.

[235] AN Yiannopoulous *Louisiana civil law treatise: Praedial servitudes* vol 4 (2015) §6.5.

[236] No 07-3779 2008 WL754716 1 (ED La Mar 19 2008). See chapter 5 part 5 3 2 2 for a discussion of this case. See also A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209 1224.

[237] AG McBride "The need for legislative authorization of noncompete servitudes in commercial leases" (2017) 61 *Loyola Law Review* 325 360.

is fair, reasonable, creates or has the potential to create economic benefits and if it is recorded in the deed of the shopping center.[238] In this regard, McBride suggests that the proposed statute in Louisiana should provide recommendations for courts to consider when examining whether a restraint of trade agreement meets the aforementioned criteria. When considering fairness, courts should look at the bargaining power of the parties to the lease agreement. If the parties to the servitudal agreement are on equal footing and the lessee is able to make a fair exchange for the servitude to burden the shopping center, the servitude would meet the fairness criterion.[239] McBride does not elaborate on what the content of a fair exchange would entail. §3 6 of the *Restatement (Third) of Property: Servitudes* in the United States of America provides useful guidelines to assess the reasonableness of servitudes in restraint of trade.[240] A comment in the *Restatement (Third) of Property: Servitudes* to §3 6 holds that courts should look 'to the purpose, geographic extent, and the duration of the restraint to determine' the reasonableness of a servitude in restraint of trade. McBride suggests that the geographic extent of the servitude in restraint of trade could be restricted to the boundaries of the shopping center where the specific tenant is situated. If the shopping center is large, the restriction regarding the boundaries of the shopping center may be smaller. Hotard's proposal as discussed in part 5 3 2 3 pertaining to negative praedial servitudes in restraint of trade is also crucial to evaluate the reasonableness criterion, especially his suggestion that the legislature should limit restraint of trade agreements for a maximum enforceable period. [241] A reasonable enforceable period could be approximately five to ten years. The duration period of the covenant in this context should be lengthy enough to be meaningful.[242] However, it should also be short enough to guarantee that the property is reverted to free commercial use within a reasonable time. The precise duration should be investigated comprehensively with the input of business owners.[243] McBride suggests that the duration of the servitude in restraint of trade could be restricted to the period of the

[238] AG McBride "The need for legislative authorization of noncompete servitudes in commercial leases" (2017) 61 *Loyola Law Review* 325 360.
[239] AG McBride "The need for legislative authorization of noncompete servitudes in commercial leases" (2017) 61 *Loyola Law Review* 325 361.
[240] AG McBride "The need for legislative authorization of noncompete servitudes in commercial leases" (2017) 61 *Loyola Law Review* 325 361.
[241] A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209 1243-1244.
[242] A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209 1243-1244.
[243] A Hotard "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209 1243-1244.

lease agreement.[244] Furthermore, the legal framework should also provide guidelines for courts when examining the economic impact that the servitude has on the local economy.[245] If the anchor tenant sells local products and employs local members of the community as employees, the existence of the servitude should be favoured because of the anchor tenant's commitment to the local economy. The legal framework should also comprise a guideline requiring of courts to analyse the economic impact of the anchor tenant in the specific shopping center. The economic impact of the anchor tenant could be illustrated by means of statistical data regarding the anchor tenant's ability to attract customers to shop in the shopping center; and their ability to attract lessees to rent space. Courts can look at the history of the anchor tenant's economic impact in other shopping centers. Other guidelines that should be incorporated in the framework could be to measure the damages caused by competition and the burden that will be created if the anchor tenant cannot institute direct legal action against a co-tenant who threatens to or engages in direct competition. McBride also suggests that the opportunity to create servitudes in restraint of trade should not be exclusive to well established anchor tenants. Small-scale tenants should also have the opportunity of creating such servitudes provided that they have a large enough presence in a shopping center that will create a positive impact for the economy. In addition, the negative personal servitude in restraint of trade should be recorded to enable other lessees in the shopping center to have notice of the restraint agreement. The recorded lease agreement should contain clear language regarding the intention of the parties to the restraint of trade agreement. It should also clearly specify the extent of the restriction and the conditions that are imposed by the servitude.

Florida's legal position pertaining to exclusive use covenants embedded in lease agreements as discussed in part 6 3 3, the policy reasons in favour of such covenants and the content of the statute proposed by McBride are very important for South African law. The South African Constitutional Court's assertion that these type of agreements could possibly be recognised as negative personal servitudes is a major breakthrough in legal development as it illustrates the court's willingness to develop the law to accommodate the needs of modern society. However, in the recent case of *Quest*

[244] AG McBride "The need for legislative authorization of noncompete servitudes in commercial leases" (2017) 61 *Loyola Law Review* 325 361.
[245] AG McBride "The need for legislative authorization of noncompete servitudes in commercial leases" (2017) 61 *Loyola Law Review* 325 361-362.

*Petroleum (Pty) Ltd v Walters and Another*[246] the court held that agreements in restraint of trade could never fit the description of a negative personal servitude in restraint of trade.

The area pertaining to exclusive use covenants in commercial lease agreements is highly debatable and is still regarded as murky in South African law. Currently the Competition Commission[247] is in the process of conducting a market inquiry of the grocery retail sector regarding the validity of exclusive use covenants embedded in lease agreements. The inquiry commenced on 27 November 2015. The Competition Commission is authorised to conduct market inquiries in terms of section 43 of the Competition Act 89 of 1998 if it has reason to believe that any feature or combination of features of a market for any goods may prevent, distort and restrict competition; or to achieve the purpose of the Competition Act. I am of the opinion that the Competition Commission and any South African court confronted with the question whether an exclusive use covenant is valid, should take into account all the influential policy arguments and suggestions as discussed in this section of the chapter. Exclusive use covenants should not be refuted as unlawful as these legal instruments are important for commercial purposes. If the statutory proposal is taken into consideration and adopted in South African law either by means of creating new legislation, it will guide courts to meaningfully engage with the law and to reach a fair and equitable outcome for all parties concerned.

## 6 4 Conclusion

The aim of this chapter was to demonstrate the alternative ways of structuring trade agreements. The first part of the chapter evaluated the alternative mechanisms of

[246] *Quest Petroleum (Pty) Ltd v Walters and Another* unreported decision (16225/2017) [2018] ZAWCHC 163 (9 November 2018). This dissertation contends that the court erred in its judgment. In this regard, see chapter 5 part 5 4.

[247] In South Africa, the Competition Commission is a statutory body. The Commission have been constituted in terms of the Competition Act 89 of 1998. Three independent competition regulatory authorities have been established in terms of the Act, namely the Competition Commission, Competition Tribunal and the Competition Appeal Court. The Competition Commission is the investigative and enforcement agency, the Tribunal is the adjudicative body and the Competition Appeal Court considers appeals against decisions of the Tribunal. These authorities are administratively accountable to the Department of Economic Development. The purpose of the Competition Commission is to investigate, control and evaluate restrictive business practices in order to achieve fairness and productivity in the South African economy. The primary goal is to promote and maintain competition in South Africa. See <http://www.compcom.co.za/who-are-we/> (accessed 18-02-2019).

regulating a positive right to trade on another individual's land. Existing case law in South Africa serves as authority that the right to trade on another individual's property can be regulated by contractual agreements in the form of either an innominate contract[248] or a lease agreement.[249] It appears from case law that whether a right to trade on another's property will be categorised as an innominate contract or lease agreement will depend on the *essentialia* of the contract. Each type of contract has its own set of *essentialia* and *naturalia*.[250] If a contract does not contain the *essentialia* of any of the acknowledged types of contract, it will be regarded as an innominate contract. The cases of *Kessler*, *Nel* and *Botha* illustrated that if a right to trade on another individual's land does not comply with the *essentialia* of the acknowledged types of contract, it will be regarded as an innominate contract. Even though jurisprudential authority exists for acknowledging a right to trade in the form of an innominate contract, it is important to highlight the legal implications of such a contract. The legal consequence of an innominate contract is that it only gives rise to a personal right[251] and not a real right in land. As explained in chapter 2, the distinction between a real and personal right is important because the distinction forms the basis for the division of the law of property and the law of obligations.[252] The importance of this distinction is that different consequences flow from real rights as opposed to personal rights.[253] Real rights are enforceable against third parties whereas personal rights are

[248] *Kessler v Krogmann* 1908 TS 291 297-298; *Nel v Abrahams & Sloot* 1911 TPD 24 28; *Potgieter and Another v Minty and Sons and Additional Magistrate Barberton* 1929 TPD 745 753.
[249] *South African Railways & Harbours v Springs Town Council* 1949 (2) SA 34 (T); *Young v Smith* 1961 (3) SA 793 (T).
[250] ADJ van Rensburg, JG Lotz, T van Rhijn in "Contract" in RH Christie & RD Sharrock (eds) *The law of South Africa* vol 9 3 ed (2015) para 354; *Naturalia* is a set of unexpressed standard terms which apply to each contract falling into a specific category, such as contract of sale, contract of letting and hiring or contracts of service. The standard terms are known as the *naturalia* of a contract and they are terms which arise by operation of law. In other words they will always be read into a contract even though they may never have been contemplated by the parties to the contractual agreement. The *naturalia* of a contract are directory and will apply to a specific contract only in so far as the parties have not agreed on certain aspects. Certain *naturalia* is peremptory. The Competition Commission was appointed to conduct a grocery retail sector market inquiry with regard to the validity of exclusive use covenants embedded in retail lease agreements. The report had to be released in March 2018 but was postponed to be released on 28 September 2018. I followed up with the Competition Commission last year and in this year, but received no feedback. At the time the dissertation was completed, the report had not yet been released.
[251] *De Jager v Sisana* 1930 AD 71 85.
[252] CG van der Merwe *Sakereg* 2 ed (1989) 58; P Badenhorst, W Freedman, J Pienaar & J Van Wyk *The principles of the law of property in South Africa* (2010) 50; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* 5 ed (2006) 47-69; CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2 ed (2010) para 59. CG van der Merwe "Things, time, time-sharing and shareblocks" in WA Joubert, JA Faris (eds) *The law of South Africa* vol 27 2 ed (2014) para 59.
[253] CG van der Merwe "Things, time, time-sharing and shareblocks" in WA Joubert, JA Faris (eds) *The law of South Africa* vol 27 2 ed (2014) para 59.

only binding on a specific individual or a group of individuals.[254] With this in mind, it is doubtful whether an individual would settle for a personal right to secure her trading interests because a personal right will only be enforceable against the initial landlord whereas a limited real right will ensure that the tenant's right would be enforceable against the landlord's successors in title as well as violating co-tenants in the shopping center.

This chapter also showed that authority exists for the recognition of a right to trade on someone else's property as the subject matter of a lease agreement, provided that the *essentialia* of a lease agreement are complied with.[255] The *essentialia* of a lease agreement are that there should be agreement on the property that will be leased for the purpose of use and enjoyment by the lessee, and the amount payable by the lessee should be determined or at least be determinable.[256] Similar to an innominate contract, the nature of a lease agreement is that it creates a purely contractual obligation that is binding on the original parties to the contractual agreement.[257] Generally, a lease agreement provides a lessee with a personal right, however a lease can also provide proprietary protection.[258] Different categories of lease agreements exist and the level of proprietary protection afforded to the lessee will be different in each category. A distinction can be made between a short-term lease agreement and a registered or unregistered long-term lease agreement.[259] Short-term and long-term

---

[254] H Mostert & A Pope (eds), P Badenhorst, W Freedman, J Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 47.

[255] *South African Railways & Harbours v Springs Town Council* 1949 (2) SA 34 (T) 55; *Young v Smith* 1961 (3) SA 793 (T).

[256] C Hugo & P Simpson "Lease" in R Zimmerman, D Visser & K Reid (eds) *Mixed legal systems in comparative perspective property and obligations in Scotland and South Africa* (2004) 301 302; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 427-430; K Lehman "Letting and hiring of property" in F du Bois (ed) *Wille's principles of South African law* 9 ed (2007) 906 907; CJ Nagel *Business law* 4 ed (2011) 157; G Bradfield & K Lehman *Principles of the law of sale and lease* 3 ed (2013) 135; G Glover *Kerr's law of sale and lease* 4 ed (2014) 329.

[257] WE Cooper *Landlord and tenant* 2 ed (1994) 276; C Hugo & P Simpson "Lease" in R Zimmerman, D Visser & K Reid (eds) *Mixed legal systems in comparative perspective property and obligations in Scotland and South Africa* (2004) 301-334 302-308; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 427; K Lehman "Letting and hiring of property" in F du Bois (ed) *Wille's principles of South African law* 9 ed (2007) 906 907; CJ Nagel *Business law* 4 ed (2011) 156; G Bradfield & K Lehman *Principles of the law of sale and lease* 3 ed (2013) 137; S Viljoen *The law of landlord and tenant* (2016) 49.

[258] PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 430.

[259] C Hugo & P Simpson "Lease" in R Zimmerman, D Visser & K Reid (eds) *Mixed legal systems in comparative perspective property and obligations in Scotland and South Africa* (2004) 301 311-312; K Lehman "Letting and hiring of property" in F du Bois (ed) *Wille's principles of South African law* 9 ed (2007) 906 908-909; G Bradfield & K Lehman *Principles of the law of sale and lease* 3 ed (2013) 179-186; S Viljoen *The law of landlord and tenant* (2016) 51; AJ Kerr *The law of sale and lease* 3 ed (2004) 275-285.

unregistered lease agreements afford proprietary protection in the form of the *huur gaat voor koop* rule. This principle provides tenure security for tenants against the landlord's successors in title for the duration of the lease agreement. However, the degree of protection provided to a tenant of an unregistered long-term lease agreement is limited as protection is dependent on a third party's knowledge of the contractual agreement. If a third party did not have any knowledge of the contractual agreement, the tenant will only be able to enforce the right to occupy the building for a period of ten years in the case of a short-term lease agreement. Registered long-term lease agreements provide greater protection for a tenant because tenure security automatically gets elevated to the status of a limited real right that will be enforceable against all third parties irrespective of whether the particular parties had notice of the lease agreement.

The aim of this chapter was not only to illustrate alternative mechanisms for structuring a right to trade on another's land but also to consider whether it is necessary for trading rights to be structured specifically as a servitude. Chapter 4 illustrated that a right to trade on another's land can also be regulated by means of a praedial or personal servitude. If a right to trade is registered as a praedial servitude the burden will be placed on the land in perpetuity. If it is registered as a personal servitude, the servitude holder will benefit from the servitude in her personal capacity for the rest of her life. Obviously, the contextual needs and intention of a party wishing to trade on another individual's land will ultimately determine the specific legal construct that should regulate the agreement. However, my submission is that if the party secures her right to trade on another's land by means of a praedial servitude, personal servitude or a registered long-term lease agreement instead of a standard lease or innominate agreement, her rights will certainly be better protected because a limited real right is ultimately stronger than a personal right because it is applicable *erga omnes* as opposed to *inter partes*.

The second part of the chapter also considered alternative mechanisms of structuring a restraint of trade agreement. In this regard, focus was specifically placed on restrictive covenants as a tool to regulate restraint of trade agreements. In English law and American common law restrictive covenants are generally used to regulate agreements in restraint of trade. In these countries, a real covenant is regarded as a servitude. The reason for discussing restrictive covenants in this chapter was because they potentially provide another avenue to structure trade agreements in South African

law. Furthermore, the aim was to evaluate whether restrictive covenants provide better or similar protection than a servitude. However, restrictive covenants have a precarious nature in South African law.[260] In South Africa, the point of departure has always been that restrictive covenants are servitudes.[261] However, Van Wyk avers that this perspective is only partially true. Restrictive covenants do not constitute servitudes in the traditional sense of the word.[262] What is important is that there is agreement that a restrictive covenant creates limited real rights.[263] The practice of using restrictive covenants has become redundant in South African law.

The central question pertaining to the second part of the chapter was whether restrictive covenants should be revived in South African law as an alternative mechanism to regulate restraint of trade agreements given the fact that restrictive covenants play a crucial role in foreign jurisdictions such as England and Florida. It appears that the establishment requirements for a restrictive covenant in English law are analogous to the establishment requirements of a negative praedial servitude in restraint of trade as discussed in chapters 3 and 5. In light of the similarities between a servitude as applied in South African law, and a restrictive covenant as applied in English law, it seems that it is not necessary for restrictive covenants to be revived in South African law as a servitude is sufficient to accommodate a restraint of trade agreement as illustrated in chapter 5.

This chapter also considered exclusive use covenants (personal rights) embedded in commercial retail lease agreements as a tool to protect anchor tenants in shopping centers from competition. Technically speaking, exclusive use covenants are personal covenants and are creatures of the law of contract, which make them personal rights. They are at all times only binding on the original parties who entered into the contractual agreement. However, this chapter showed that these personal covenants could also be elevated to a restrictive "real" covenant with third party effect if it is authorised in terms of the contractual agreement.[264] For an exclusive use covenant embedded in a lease agreement to become real, it should touch and concern

---

[260] J van Wyk *Planning law* 2 ed (2012) 303. See also PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 345-346.
[261] CG van der Merwe *Sakereg* 2 ed (1989) 501.
[262] J van Wyk *Planning law* 2 ed (2012) 303, 313-316. See also chapter 3 footnote 349 of dissertation for the differences between a restrictive covenant/restrictive condition and a servitude.
[263] J van Wyk *Planning law* 2 ed (2012) 303. See also PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 345-346.
[264] TD Marsh "Because of *Winn-Dixie*: The common law of exclusive use covenants" (2015) 69 *University of Miami Law Review* 935 938.

the land, the contracting parties should have the intention that the covenant should run with the land and a notice should exist of the restriction on the part of the party against whom enforcement is sought.[265]

The case of *Winn-Dixie* serves as authority for the fact that Florida's legal framework provides that an exclusive use covenant embedded in a registered commercial lease agreement could be automatically elevated to a real covenant. However, before this can take place, the covenant should stipulate that the landlord and tenant had the intention that it should run with the land and there should be notice of the restraint on the part of the party against whom enforcement is sought.[266] The problem with the *Winn-Dixie* judgment is that the court did not address how a personal covenant could be transformed into a real covenant, especially in light of the wording of Winn-Dixie's exclusive use covenant.[267] The exclusive use covenant in this particular instance was not worded as a restriction on land, but as a restriction on the behaviour of the landlord. The covenant did not stipulate whether the restriction would be enforceable against the landlord, third-party retailers or both parties.[268] The legal repercussions of courts elevating personal rights to real rights automatically, without evaluating whether the wording of the covenant is in actual fact in compliance with the establishment requirements for the creation a restrictive covenant, poses a great danger as it could lead to legal uncertainty and a proliferation of burdens on land. Therefore, it is important that exclusive use covenants should be drafted carefully.[269] The question that surfaced was whether an exclusive covenant in the South African context, embedded in a commercial long-term registered lease agreement could be elevated to the status of a limited real right. In this regard the case of *Masstores (Pty) Ltd v Pick 'n Pay Retailers (Pty) Ltd*[270] is important. Like *Winn-Dixie* this case concerned an alleged interference by the applicant (a third party co-tenant) with the trade of the respondent (anchor tenant) in a shopping center. The "trade" that the anchor tenant sought to protect was an exclusive contractual right to trade as a supermarket in a shopping center, granted to the anchor tenant by the lessor in a lease

[265] TD Marsh & S Szwarc "Transforming lease covenants into real covenants: Lessons from *Winn-Dixie v Dolgencorp*" (2015) 29 *Probate and Property Magazine* 35 38.
[266] *Winn-Dixie Stores Inc v Dolgencorp LLC* 746 F 3d 1008 (11 Cir 2014) 1037.
[267] TD Marsh "Because of *Winn-Dixie*: The common law of exclusive use covenants" (2015) 69 *University of Miami Law Review* 935 965.
[268] TD Marsh "Because of *Winn-Dixie*: The common law of exclusive use covenants" (2015) 69 *University of Miami Law Review* 935 968.
[269] TD Marsh "Because of *Winn-Dixie*: The common law of exclusive use covenants" (2015) 69 *University of Miami Law Review* 935 940.
[270] 2017 (1) SA 613 (CC).

agreement which was embedded in an exclusive use covenant. The anchor tenant did not seek enforcement of the contractual right against the lessor, but against the third party co-tenant, although there was no contractual relationship between the anchor tenant and co-tenant. This case is important because Froneman J held that an exclusive use covenant (which is presumably a personal right) embedded in a lease agreement should be specifically designed as a negative personal servitude to protect the anchor tenant from competition by third party co-tenants in the shopping center.[271] In light of the *Masstores* case, it appears that it is once again not necessary to revive restrictive covenants as a tool to regulate exclusive use covenants embedded in commercial lease agreements because a negative personal trading servitude would provide the necessary protection.

As alluded to in part 6 3 3 of this chapter, restrictive covenants and negative servitudes in restraint of trade could stir up anti-competitiveness because such legal tools could make it difficult for small competing companies to enter commercial sectors that are burdened with these legal tools. However, it was argued in part 6 3 5 that restraint in trade agreements embedded in commercial lease agreements are important and that it cannot be regarded as unlawful due to anti-competitive concerns. To address the anti-competitive concerns regarding restraint of trade agreements and to accommodate the interests of third party co-tenants and anchor tenants, I argued that a legislative framework should be adopted as suggested by McBride. Legislation will ensure that the rights of anchor tenants and co-tenants are balanced in a fair manner. The legal framework regulating exclusive use covenants in commercial lease agreements should only recognise exclusive use covenants embedded in lease agreements if it is fair, reasonable, creates or has the potential to create economic benefits and if it is recorded in the title deed of the shopping center to enable third party co-tenants to have notice in advance of the burden placed on the shopping center.[272] It should also contain factors that will assist the court in determining whether the covenant is in compliance with the aforementioned requirements. Examples of such factors are fairness and reasonableness criteria that provide guidance on the maximum enforceable period of restraint of trade agreements. The duration should be short to ensure that it is eventually returned to free commercial use within a reasonable

[271] 2017 (1) SA 613 (CC).
[272] AG McBride “The need for legislative authorization of noncompete servitudes in commercial leases” (2017) 61 *Loyola Law Review* 325 360.

time. Factors that should be taken into account when considering the economic impact of exclusive use covenants are: whether the anchor tenants are committed to the local economy, the anchor tenant's capability of attracting customers and lessees to rent space in the shopping center; the general history of the anchor tenant's economic impact in other shopping centers; measurement of the damages caused by competition and the legal implications that will be created if the anchor tenant cannot institute direct legal action against a co-tenant who threatens to or engages in direct competition.

# Chapter 7: Conclusion

## 7 1 Introduction

This research focused on the potential creation of novel categories of servitudes in land. More specifically, it questioned whether trading rights can be recognised as servitudes. If it is possible to recognise such a category of servitudes, it is crucial to determine the nature and content of such a right and the conditions under which such servitudes could be registered. The point of departure is that novel servitudes can be created, provided that they comply with the general requirements of section 63(1) of the Deeds Registries Act 47 of 1937 and the subtraction from the *dominium* test as developed in case law. Once a novel servitude is recognised as a limited real right in land that burdens the servient landowner and all her successors in title, the question is what type of servitude comes into existence (praedial or personal). If a praedial servitude is to be created, it also has to comply with the more specific requirements for the establishment of praedial servitudes. If a personal servitude is in turn created, it presumably has to comply with the requirements for the establishment of a personal servitude. Both praedial and personal servitudes might be subject to further statutory requirements like the Alienation of Land Act 68 of 1981 and the Subdivision of Agricultural Land Act 70 of 1970.

Trading rights can take two forms. On the one hand, it can take the form of a positive servitude, namely an individual's right to trade on someone else's land. On the other hand, these rights can take the form of a negative servitude that prevents someone from trading on their own land. To determine whether trading rights could be recognised as a servitude, this dissertation begins with an analysis of section 63(1) of the Deeds Registries Act and the subtraction from the *dominium* test as developed by South African courts. This is followed by an investigation into the requirements for the creation of praedial and personal servitudes in land. Thereafter, a discussion is provided of case law dealing with the right to trade on another's land and the right to prohibit another from trading on their own land. That discussion sets the platform for considering alternative ways of structuring trade agreements. This is done in order to provide a holistic view of the way in which these types of agreements can be set up, or have been set up in the past, in the absence of specifically structuring them as servitudes. This concluding chapter aims to provide some of the most important

conclusions reached from the research project.

## 7 2 The *numerus clausus* principle and the possible creation of new limited real rights

This dissertation showed that it is possible to create new categories of trading servitudes in South African law, provided that the creation of these types of limited real rights are always in compliance with applicable restrictions, such as anti-fragmentation strategies. Examples of an anti-fragmentation device is the traditional civilian *numerus clausus* principle. South Africa does not strictly adhere to the *numerus clausus* principle, however it does have an anti-fragmentation strategy in the form of a statutory and doctrinal framework that limit the creation of new limited real rights. Pivotal examples in this regard are, section 63(1) of the Deeds Registries Act, the intention and judicially developed subtraction from the *dominium* tests. Other pieces of legislation such as the Alienation of Land Act and the Subdivision of Agricultural Land Act, provide additional formal requirements that further restrict the creation of servitudes in land. The primary goal of these anti-fragmentation strategies is to serve as a mechanism to prohibit the fragmentation or erosion of landownership.

Chapter 2 specifically examined whether these anti-fragmentation strategies inhibit the creation of novel categories of servitudes by consensus. The assessment was done within the civilian framework of the *numerus clausus* principle and the statutory and doctrinal frameworks as applied in South African law. The research sought to determine whether a trading right could fit the description of a limited real right in the form of a servitude.

Even within the context of the *numerus clausus* principle it was submitted that no barrier exists for the creation of novel categories of servitudes like trading servitudes in South African law. This is because in terms of the *numerus clausus* principle, when an individual creates a property right, she has to select from the already available types of property rights. Traditionally, servitudes are already a recognised category of limited real rights. Therefore, creating a novel category of servitudes in the context of trading rights should not be problematic, provided that the common law criteria for the establishment of a servitude are complied with as discussed in chapter 3.

Chapter 2 also examined whether the statutory and doctrinal frameworks as applied in South African law, present a barrier to the creation of novel categories of limited real rights such as trading servitudes. Section 63(1) of the Deeds Registries Act provides that only real rights may be registered in the deeds registry. Unfortunately, section 63(1) does not provide a definition for real and personal rights, making the distinction between these rights difficult. It is left to the courts to determine whether the nature of a particular disputed right is real or personal. Courts are guided by two criteria to determine whether a right is real or personal. Firstly, the intention of the parties creating a limited real right should be to bind not only the current owner of the land, but also her successors in title. Furthermore, the right must result in a subtraction from the *dominium* of the land against which it is to be registered. Chapter 2 illustrated that even though these two criteria exist, it still does not provide an easy answer with regard to the question whether a particular right is real and therefore registrable. Important insights pertaining to the content of the subtraction from the *dominium* test are provided by *Ex parte Geldenhuys*[1] and *Lorentz v Melle and Others*[2] where it had to be decided whether a right is real or personal. These cases held respectively that a right will be regarded as real if the particular right places a burden on land and when it restricts the owner's enjoyment of her property in a physical sense. Thus, the question whether trading rights amount to a real right depends on the further question of whether positive and negative trading rights place a burden on land, and whether they restrict the owner of the servient tenement's enjoyment in a physical sense.

In light of the statutory framework and case law that are discussed in chapter 2, it was argued that it is conceivable that a trading right is property-like in that it can be connected to the land and it has the potential of burdening land and restricting an owner's enjoyment with regard to her property, thereby having the nature of a real right. However, trading rights are a problematic category of potential servitudal condition because it may appear at first glance that such conditions are aimed at benefitting the business interests of the individual owning the benefitted property and not the land itself. The difficult question is therefore to determine whether such forms of trading agreements can in actual fact 'run with the land' and therefore be enforceable against third parties. These uncertain questions could only be answered upon the analysis of

[1] 1926 OPD 155.
[2] *Lorentz v Melle and Others* 1978 (3) SA 1044 (T); AJ van der Walt "Personal rights and limited real rights: A historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *Tydskrif vir Heedendaagse Romeins-Hollandse Reg* 170 195-196.

compliance with the requirements for the establishment of a praedial or personal servitude, which also serves as an anti-fragmentation strategy in South African law. The requirements for the establishment of a praedial and personal servitude are discussed in chapter 3 of this dissertation. These common law anti-fragmentation strategies ensure that not all consensually created rights to use or benefit from another's land qualify as a servitude. It is only once these additional requirements pertaining to the creation of a limited real right have been carefully scrutinised that it will be known whether trading rights have the effect of subtracting from the *dominium* and whether it is therefore registrable as a limited real right.

## 7 3 Establishment requirements for praedial and personal servitudes

Chapter 3 assessed whether a trading right has the potential nature of a praedial or personal servitude. It also analysed whether the common law criteria for the establishment of praedial and personal servitudes are flexible enough to allow for the creation of these novel servitudes when the needs of a developing modern society so requires.

The significant requirements for the establishment of praedial servitudes are: two tenements belonging to different owners should exist; the passivity requirement holds that the owner burdened by a servitude can never be obliged to positively do something on the servient land; and the *utilitas* requirement, which entails that the servient tenement should benefit the dominant tenement and not the mere personal interests of the owner of the dominant land. The requirements that the two parcels of land should be in close proximity (*vicinitas*) and that the servient tenement should serve the dominant tenement for a relatively durable period (*perpetua causa*) are essentially captured within the *utilitas* requirement. Therefore, it will arguably not result in a hurdle for the establishment of trading servitudes.

*Vicinitas* does not pose a problem for the recognition of trading rights as a praedial servitude. This requirement is flexible as it does not necessarily entail that the two tenements should share a common border as the parcels of land could also be located reasonably close together. The distance between the parcels of land has to be assessed within the context of the *utilitas* requirement. In other words, it is important that the servient tenement should at all times benefit the dominant tenement, no matter

the distance between the two parcels of land. If the servient and dominant tenements are located far from each other the servient tenement cannot benefit the dominant tenement, and a praedial servitude cannot be established in those circumstances. It is also important to take note that the establishment of a praedial servitude is not prohibited in situations where the servient and dominant tenement are separated by an intervening parcel of land. However, in such a case a praedial servitude could only be established where another servitude is established over the intervening land.

Similar to the *vicinitas* requirement, the establishment requirement of *perpetua causa* should also be assessed within the context of the *utilitas* requirement. *Perpetua causa* should not be literally interpreted to mean that the servitude should constantly fulfil the needs of the dominant tenement. This requirement entails that the servitude should manifest the needs of the dominant tenement and the successors in title of the dominant tenement for a relatively durable period. The benefits provided should not be transient or incidental. If the benefit provided by the servitude is momentary, it serves as an indication that the servitude benefits the interests of the specific owner and not the land and the interests of her successors in title. In such a scenario, a praedial servitude cannot be established. The *perpetua causa* requirement will only be regarded as complied with if the benefit appears to be relatively durable. Furthermore, even if the benefit provided by the servient tenement is temporarily absent, the servitude will be suspended until it is possible to exercise the servitude again. The *perpetua causa* requirement does not pose a problem for the establishment of trading rights as a praedial servitude.

A pivotal – and perhaps most problematic – requirement for the establishment of a praedial servitude in the context of trading rights, is the *utilitas* requirement. Problems relating to positive trading rights are whether a right to trade on someone else's land could ever serve the dominant tenement and not merely the interests of a specific person. Problems relating to negative trading rights in turn are whether the right to prohibit another from trading on their own land to protect the owner of the dominant tenement against precarious competition serves the interests of the land, or simply the mere personal interests of a specific person. Chapter 3, thus examined the various interpretations of the *utilitas* requirement to determine whether a strict, but yet flexible, definition exists that could accommodate trading rights as a potential praedial servitude. Three interpretations exist with regard to the *utilitas* requirement and it was

submitted that the somewhat wider interpretation of the *utilitas* requirement as proposed by De Waal is the most appropriate interpretation to accommodate trading rights as a potential category of servitude. This interpretation holds that a servitude can only be established if it increases the utility of the dominant tenement in accordance with the dominant tenement's economic, industrial or professional purpose. In order to draw a clear line between servitudes that enhance the utility of the dominant tenement and servitudes that satisfy the personal delight of an individual owner, it is important that the servitude should increase the benefit with regard to the usage of the dominant tenement on a durable basis for everyone who uses the land in accordance with its purpose. When dealing with positive and negative trading rights in the form of praedial servitudes, a close link should exist between the burden that is imposed on the servient tenement, and the benefit that the servitude holds for the dominant tenement.

The requirement of *servitus in faciendo consistere nequit* is also an important requirement for the establishment of a praedial servitude. This requirement entails that the owner of a servient tenement can never be compelled to perform a positive duty in terms of a servitude. The rationale behind this is that the positive obligation to render a performance is ordinarily a characteristic of a personal right. This requirement, like all the other requirements, serves as an anti-fragmentation device to protect landownership against unnecessary burdens that could impede commercial liberty. Only one exception exists with regard to the passivity requirement, namely *servitus oneris ferendi*. This exception holds that a dominant tenement owner may rest a structure on land or on a structure located on the servient tenement. This is also known as a servitude of support. It has been questioned whether the passivity requirement is too strict and whether it should not be made more flexible to accommodate the needs of modern society. In German and Dutch law, for instance, it appears that the passivity requirement has a flexible interpretation. De Waal proposes that a restricted possibility should also be established in South African law; one that will allow the owner of the dominant tenement with the right to oblige the owner of the servient tenement to exercise maintenance duties on the servient tenement, especially where the exercise of the particular servitude is dependent on a construction or plant situated on the servient tenement. However, he suggests that such a positive obligation should not be the principal essence of the servitude agreement. It should be an additional or ancillary obligation only. De Waal's suggestion is important especially in the context of positive

trading servitudes. The content of such a servitude ordinarily entails the owner of the dominant tenement occupying a building on the servient tenement to conduct certain commercial activities. It was argued in chapter 3 that it is reasonable to expect from the servient owner to share maintenance duties with regard to the building situated on the servient tenement. Therefore, the passivity requirement should have a more flexible interpretation to accommodate positive praedial trading servitudes. The passivity requirement is also relevant with regard to negative praedial trading servitudes. An example can be found in German law where security servitudes are used when the goal of the dominant tenement owner is to oblige a landowner to buy products or services from her. A security servitude entails an agreement between the owner of the dominant and servient tenement that the owner of the servient tenement will not sell any oil or beer products on the servient tenement. In other words, the agreement is a servitude in restraint of trade. The owner of the dominant and servient tenement will also enter into a purely contractual agreement in addition to the servitudal agreement that will allow the owner of the servient tenement to exclusively sell products bought from the supplier. This servitude and contractual legal construct are created in favour of the owner of the dominant tenement. This construct has been accepted in German case law because the servitude prohibiting trade remains unaffected by the accompanying contract that obliges the owner of the servient tenement to sell the goods of the owner of the dominant tenement exclusively. The positive duty that rests on the servient tenement owner is purely a personal right and not a real right. This legal construct pertaining to negative praedial trading servitudes in restraint of trade is controversial as it is a circumvention of the principle that a praedial servitude cannot impose a positive duty to act on the servient tenement.

If a trading right does not comply with the requirements for the establishment of a praedial servitude, it is conceivable that a personal servitude may be established. A personal servitude is a limited real right to the movable or immovable property of someone else that grants the beneficiary with the entitlements of use and enjoyment in her personal capacity and not as the owner of a particular parcel of land. Section 66 of the Deeds Registries Act provides that personal servitudes cannot exceed the lifetime of the beneficiaries and are not transferable. This requirement ensures that rights are created and used in a manner that will not lead to an unchecked proliferation of burdens on land or the erosion of the right of the servient tenement owner. Personal

servitudes can be created provided that they are in compliance with the requirements for the creation and acquisition of a limited real right.

The traditional categories of personal servitudes are the servitudes of *usus*, *ususfructus* and *habitatio*. Modern categories of personal servitudes are *servitutes irregulares* and novel personal servitudes. Chapter 3 examined the various categories of personal servitudes in order to determine the category which would best accommodate a positive and negative personal trading servitude. The category of *ususfructus* can be eliminated as a category to accommodate positive and/or negative trading servitudes because the content of a *ususfructus* is ordinarily not synonymous with the content of trading servitudes. It is therefore highly unlikely that trading rights would ever be structured as *ususfructus*. The category of *usus*, appears to be suitable to categorise positive trading servitudes. There is no specific requirement that prohibits the structuring of a positive right to trade on a tenement in the form of *usus*. This is because this servitude entails *using* a building situated on the servient tenement. A right to trade usually entails using a building to conduct commercial activities. However, the category of *usus* is not suitable to accommodate a negative trading servitude due to the fact that the content of *usus* is not synonymous with the content of a negative trading servitude. The personal servitude of *habitatio* can also be eliminated due to the fact that the nature and content of this category of servitude does not accommodate the nature and content of a positive or negative trading servitude as the servitude of *habitatio* is ordinarily designed for residential purposes and trading rights are essentially commercial in nature.

The category of *servitutes irregulares* also seems to be a suitable category to accommodate a right to trade on someone else's land as the content of a positive right to trade on someone else's land is similar to the definition of a *servitutes irregulares*. However, a negative personal trading servitude in restraint of trade cannot fit the description of a *servitutes irregulares* because the content of a negative personal trading servitude is not the same as such a category of personal servitudes. It was suggested by Van der Walt that both positive and negative trading servitudes are in actual fact completely novel categories of servitudes. However, it seems as though there are more categories into which trading rights could potentially fit. The categories of personal servitudes that best suit positive trading rights, are *usus*, *servitutes irregulares* or novel personal servitudes. No formal establishment requirement exists

that will preclude the recognition of trading rights into either of the three categories. Negative personal servitudes in restraint of trade is a completely novel category of personal servitude because it does not fit the description of *ususfructus*, *usus*, *habitatio* and *servitutes irregulares*.

To recapitulate, it was established that novel servitudes in the form of trading rights can in principle be created provided that they comply with the statutory and the doctrinal framework as applied in South African law. In light of the discussions that took place in chapters 2 and 3, chapters 4 and 5 focused on the nature and content of positive and negative trading servitudes.

## 7 4 The right to engage in commercial activity on the servient tenement

South African case law does not clearly recognise a positive praedial trading servitude to conduct trade on the servient tenement. However, in *Stuart v Grant*[3] and *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd*[4] it appears from specific assertions made by the courts that they might be willing to acknowledge positive praedial trading servitudes in the context of conducting commercial activities on another individual's property, or using another individual's property as a commercial outlet. However, in both cases, the courts failed to explain whether such an entitlement could be established in the form of a praedial servitude. Chapter 4 showed that it could be theoretically possible to create a positive praedial trading servitude, when the doctrinal and statutory framework of South African law is applied. In light of section 63(1) of the Deeds Registries Act, the intention and subtraction from the *dominium* test, it is conceivable that a positive trading right has the ability to burden land and to subtract from the servient owner's entitlement of use and enjoyment of the land in a physical sense. Therefore, it is possible that such a right is real and registrable. Furthermore, it is possible that a positive praedial trading servitude could comply with the common law criteria for the establishment of a praedial trading servitude as proven in chapter 3.

The content of a positive praedial trading servitude could entail a servitude of market square. The content of such a servitude may presumably entail distributing and

[3] (1903) 24 NLR 416 419.
[4] 1913 AD 267; 1918 AD 1.

selling goods produced on the dominant tenement at an outlet on the market square (servient tenement). Such a servitude could be established if the dominant tenement is a farm that is developed and appointed for agricultural purposes. The market square could be used as an outlet to sell fruits and vegetables that are produced on the farm (dominant tenement). In this particular case, it is conceivable that a direct link exists between the dominant and servient tenement (market square).

Another example would be where a dominant tenement is developed and appointed as an oil refinery. If a petroleum station is located on a parcel of land that could serve as a servient tenement, the owner of the dominant tenement may negotiate for a positive praedial trading servitude to sell petroleum and gasoline to the owner of the servient tenement. In this context it is also plausible that a direct link exists between the two tenements and the *utilitas* requirement for the establishment of a praedial servitude. If the dominant tenement owner desires to sell the goods produced on the dominant tenement exclusively to the owner of the servient tenement, the passivity requirement will become relevant because in terms of this requirement a praedial servitude may not place a positive obligation on the owner of the servient tenement. The best option would be for the dominant tenement owner to negotiate for a negative praedial trading servitude such as the German security servitude (*sicherheitsdienstbarkeit*). Security servitudes have been accepted in German case law because the negative servitude in restraint of trade is unaffected by the supplementary contract. The positive duty that rests on the servient tenement owner is purely a personal right in those circumstances.

Chapter 4 also examined the possible nature and content of positive personal trading servitudes. If parties do not negotiate for a positive praedial trading servitude, a personal servitude can be negotiated in favour of the beneficiary in her personal capacity. The beneficiary does not have to be the owner of land that serves as a dominant tenement as is required in the case of a praedial servitude. An important source of authority for recognising positive personal trading servitudes in South African law is the case of *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd.*[5] In this case the court held that positive trading rights are limitations upon the rights of ownership and therefore they constitute personal servitudes. The cases of *Mergold Beleggings*

[5] 1913 AD 267; 1918 AD 1.

*(Edms) Bpk v Bhamjee en 'n Ande*r[6] and *Armstrong v Bhamjee*[7] further confirm that positive personal trading servitudes are inalienable, non-transferable and they terminate at the death of the holder of the servitude.[8] Chapter 4 illustrated that a right to trade on someone else's land could certainly fit the nature and content of a positive praedial and/or personal servitude.

## 7 5 Right to prohibit another from trading on the servient tenement

South African case law has been problematic for a long time regarding the recognition of a negative praedial servitude in restraint of trade. Chapter 5 examined South African and Louisiana case law pertaining to negative praedial trading servitudes in restraint of trade. In the South African context, it was discovered that some of the older case law that formally recognised a negative praedial trading servitude in restraint of trade, did so erroneously. Erroneous conclusions were reached because courts failed to conduct a proper investigation to determine whether the respective restraint of trade agreements were in compliance with the requirements for a praedial servitude, especially the *utilitas* requirement. For example, in the *Tonkin v Van Heerden*[9] and *Venter v Minister of Railways*[10] cases, the courts only focused on whether the particular right restricted the rights of ownership in terms of the subtraction from *dominium* test and whether it was the intention of the parties to create a negative praedial trading servitude in restraint of trade. The courts in those cases did not look at additional requirements such as whether the restraint of trade agreement truly benefitted the dominant tenement in terms of the somewhat wider interpretation of the *utilitas* requirement, or whether it only benefitted the dominant tenement owner in her personal capacity. It is difficult for negative praedial servitudes in restraint of trade to satisfy the *utilitas* requirement because they at first glance appear to merely serve the interests of a business or person, instead of providing a benefit to the dominant tenement.

[6] 1983 (1) SA 663 (T).
[7] 1991 (3) SA 195 (A) 201.
[8] *Armstrong v Bhamjee* 1991 (3) SA 195 (A) 201.
[9] 1935 NPD 589. See also CG Hall *CG Hall & EA Kellaway Servitudes* 3 ed (1973) 182; HJ Delport & NJJ Olivier *Sakereg vonnisbundel* 2 ed (1985) 576; MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 185-187.
[10] 1949 (2) SA 178 (EC). See specifically CG Hall *CG Hall & EA Kellaway Servitudes* 3 ed (1973) 183; HJ Delport & NJJ Olivier *Sakereg vonnisbundel* 2 ed (1985) 548-549; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 613; MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* LLD dissertation Stellenbosch University (1989) 190-192.

Therefore, it is always important that courts engage with these issues when confronted with the question whether a restraint of trade agreement amounts to a praedial servitude. This is because the reason why legal systems such as South Africa have a statutory and doctrinal framework with regard to the creation and acquisition of limited real rights is to prohibit the unnecessary proliferation of burdens on land. Chapter 5 part 5 2 4 illustrated the methodology that should be adopted by courts when confronted with the question whether a right to restrain trade constitutes a servitude. Firstly, it should be established that a right to restrain trade can be recognised as a limited real right in land that burdens the servient landowner and all her successors in title in terms of the intention and subtraction from the *dominium* tests. The intention and subtraction from the *dominium* tests will never be sufficient to determine whether any form of praedial servitude has been validly created. Therefore, the next question should be whether the limited real right constitutes a praedial or personal servitude. If a praedial servitude was created, it also has to comply with the requirements for the establishment of praedial servitudes.[11] If a personal servitude was created, it has to comply with the requirements and specific content for the establishment of a personal servitude.[12] Although this methodology seems obvious, it is clear from case law studied in this chapter that courts simply neglect to engage with the requirements as indicated above.

The actual common law establishment requirements for the creation of a praedial servitude should always be taken into account. If the courts in *Tonkin* and *Venter* engaged with the *utilitas* requirement as it should have, the courts would probably have come to the conclusion that a praedial servitude was not established in either of the cases because a general trade was conducted on the dominant tenement and not a specific trade that could justify a restraint of trade agreement in the form of a praedial servitude.

In the context of negative praedial trading servitudes, De Waal suggests that courts should evaluate whether the dominant tenement has been specifically developed for a specific trade that could benefit from the restraint of trade agreement on a relatively durable basis. The court's decision in *Hotel De Aar v Jonordon Investment (Edms) Bpk*[13] and the recent case of *Bedford Square Properties (Pty) Ltd*

[11] See *Lorentz v Melle and Others* 1978 (3) SA 1044 (T). See also chapter 3 parts 3 3 and 3 4.
[12] See chapter 3 part 3 3.
[13] 1972 (2) SA 400 (A).

*v Erf 179 Bedfordview*,[14] supports this view of De Waal even though the courts did not specifically use his terminology. If the courts should follow the methodological approach as showed in chapter 5 part 5 2 4 when confronted with the question of whether a restraint of trade agreement should be registered as a praedial servitude, proper effect will be given to the purpose that the existing anti-fragmentation devices aim to serve, namely to prohibit undue impediments on land. Therefore, it is important that courts should apply the common law requirements correctly in these cases. It is submitted in chapter 5 that the primary question is not whether restraint of trade agreements ought to be recognised as servitudes because it *is* legally conceivable that these servitudes could exist. The question should be whether the condition is in compliance with all the essential requirements for the creation and acquisition of a limited real right more generally, and the common law establishment criteria for praedial servitudes, more specifically.

The legal position in Louisiana regarding negative praedial trading servitudes was similarly analysed to show that negative praedial servitudes in restraint of trade are possible as a legal construct. Article 706 of the Louisiana Civil Code states that it is possible to create negative praedial servitudes in restraint of trade. Even though Louisiana permits such a form of servitude, it has a general presumption against acknowledging burdens such as praedial servitudes on land.[15] The motive behind this is that servitudes place burdens on the free disposal and use of land. Louisiana's legal framework requires of courts to avoid enforcing praedial servitudes unless the contextual facts of the specific case support the existence of a praedial servitude. The aforementioned statement is particularly interesting because chapter 5 part 5 3 2 2 illustrated that Louisiana's earlier judicial approach was more or less similar to South Africa's earlier jurisprudence, where courts tended towards recognising restraint of trade agreements in the form of praedial servitudes without evaluating whether it was in compliance with the *utilitas* requirement. Therefore, Louisiana informs South African law in that both legal systems have a statutory and doctrinal framework that allows for the creation of negative servitudes in restraint of trade. However, the problem with both legal systems is that the judiciary fails to apply the common law establishment requirements for a praedial servitude correctly.

[14] 2011 (5) SA 206 (SCA).
[15] See chapter 5 part 5 3 2 1.

A practical example of negative servitudes in restraint of trade that is in compliance with the definition of the somewhat wider interpretation of the *utilitas* requirement would be where a gas station, theatre or factory for instance is built on the dominant tenement. The building of a gas station, oil refinery, theatre or factory entails the construction of specific structures and alterations to the property on which it is built. Thus, the dominant tenement will be regarded as specifically developed and appointed for a particular trade of which successors in title of the owner of the dominant could also benefit. A future purchaser of the dominant tenement would most probably not demolish the existing structures as it would be an expensive task to demolish the improvements made by her predecessor and it was most likely specifically purchased for that goal. Therefore, the owner of the dominant tenement would benefit from negotiating for a restraint of trade agreement that will burden the adjacent land (servient tenement) to protect the dominant tenement from precarious competition. With regard to the aforementioned examples, it is foreseeable that a restraint of trade agreement could be registered as a negative praedial trading servitude because the servitude specifically benefits the dominant tenement.

Restraint of trade agreements in general have the effect of stirring up anti-competitiveness and it is a highly contested issue as not everyone favours such burdens on land. In this regard, Hotard provides insightful refined suggestions in his proposed solution when dealing with restraint of trade agreements in the context of praedial servitudes. His proposition provides an adequate balance of the needs of businesses and that of the public to ensure fairness to all parties affected by such agreements. Hotard's proposal is also reconcilable with the views of De Waal regarding the interpretation of the *utilitas* requirement. Hotard advocates for a strict administration of negative praedial trading servitudes in that they should only be authorised if they are in strict compliance with the *utilitas* requirement. In other words, only if the dominant tenement is developed for a specific trade or industry for a relatively durable period should a praedial servitude be recognised. The servitudal condition should specifically stipulate in writing which industries or trade are prohibited on the servient tenement. Furthermore, he suggests that the legislature should allow servitudes in restraint of trade purely as secondary obligations in contractual agreements. The primary essence of the contract should be the sale of land or the sale of business assets. This will ensure that only a limited amount of properties are removed from the commerce and it will prevent businesses from creating monopolies.

The duration of praedial servitudes in restraint of trade should also be restricted in legislation by establishing a maximum enforceable period for the servitude's existence. The period should be long enough to be meaningful and short enough to ensure that the property is reverted to free commercial use within a reasonable period. The precise period of duration should be investigated comprehensively and all parties affected by the agreement should provide their input.

The legal framework of South African law for the creation of limited real rights is established to prohibit novel servitudes in restraint of trade from eroding ownership and creating a proliferation of burdens on land. However, South African jurisprudence has illustrated that the risk remains that courts may omit applying the legal principles properly when having to decide whether a restraint of trade agreement amounts to a servitude. Firstly, it is suggested that courts should apply the common law establishment requirements for praedial and personal servitudes correctly. Servitudes in restraint of trade are onerous and therefore it was suggested in chapter 5 that legislation should be adopted to address various concerns pertaining to these agreements. Legislation is more visible and will allow parties to understand the content and nature of their rights when signing up for restraint of trade agreements. Hotard's proposal as well as De Waal's somewhat wider interpretation of the *utilitas* requirement should be entrenched in the proposed legislation. Hotard and De Waal's proposal has the effect of providing an adequate and fair balance of the needs of businesses and the public. Furthermore, the suggestions provided by both academic authors will further enhance and reinforce security against the proliferation of burdens on land if implemented in South African law.

With regard to negative personal trading servitudes in restraint of trade, South African law has been inconclusive until 2016 when the Constitutional Court in *Masstores (Pty) Ltd v Pick 'n Pay Retailers (Pty) Ltd*[16] per Froneman J held that to protect an exclusive right to trade embedded in a lease agreement, the anchor tenant should have negotiated for a real right, such as a negative personal servitude and not merely a personal right as it did in the particular case. Chapter 3 illustrated that in the context of the traditional categories of personal servitudes, a negative servitude in restraint of trade is not compatible with the content of any of the existing categories. In

[16] 2017 (1) SA 613 (CC).

light of this incompatibility, this type of trading servitude would most likely be categorised under a novel category of personal servitudes.

Interestingly enough, in the recent 2018 judgment of *Quest Petroleum (Pty) Ltd v Walters and Another*,[17] the Western Cape High Court held a different view with regard to the recognition of a restraint of trade agreement as a negative personal servitude. The court found that the law of servitudes does not apply to restraint of trade agreements because they are in nature similar to personal rights rather than real rights. The *Quest* decision creates confusion because the outcome of this judgment is inconsistent with the *Masstores* judgment. It might be due to the context of the restraint of trade agreements being different in each case. It may also be that the court denied the recognition of negative personal servitudes in restraint of trade in South African law entirely. It is not clear, but it appears from the *Quest* judgment that a restraint of trade agreement could under no circumstances fit the description of a negative personal servitude. It was argued in chapter 5 that the court erred in its judgment because the essence of the restraint of trade agreement in *Quest* has the effect of diminishing the servient tenement owner's use of the property in a physical sense. Therefore, it qualifies as a registrable, limited real right in terms of section 63(1) of the Deeds Registries Act also because it even complies with the stricter application of the subtraction from the *dominium* test as formulated in *Lorentz v Melle and Others*.[18] Furthermore, the court's application of the common law establishment requirements for a praedial and personal servitude pertaining to restraint of trade agreements was also erroneous. Due to the fact that no two tenements exist, the requirements for the establishment of a praedial servitude are not applicable to the facts in *Quest*. The facts of this case concerns a negative personal servitude in restraint of trade and therefore the establishment requirements for a personal servitude ought to have been discussed. The court held, and rightfully so, that a negative personal servitude in restraint of trade could not fit the description of the traditional categories of personal servitudes, namely *ususfructus*, *usus* and *habitatio*.[19] However, it was argued that it cannot be deduced from this statement that novel categories of personal servitudes could not be

[17] *Quest Petroleum (Pty) Ltd v Walters and Another* unreported decision (16225/2017) [2018] ZAWCHC 163 (9 November 2018).
[18] *Lorentz v Melle and Others* 1978 (3) SA 1044 (T) 1052; AJ van der Walt "Personal rights and limited real rights: A historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *Tydskrif vir Heedendaagse Romeins-Hollandse Reg* 170 195-196. See also chapter 2 part 2 4 2 for a discussion of the subtraction from the *dominium* test.
[19] Unreported decision (16225/2017) [2018] ZAWCHC 163 (9 November 2018) paras 31-32.

recognised in this particular context. South African law does not adhere to a *numerus clausus* of personal servitudes.[20] It was showed in chapter 3 part 3 3 that a negative personal servitude in restraint of trade could be registered as a novel category of personal servitude. Furthermore, the court's assertion that the petrol station could not serve as a servient tenement is contentious. It is clear from the facts of the case and the content of the restraint of trade agreement that the petrol station could serve as a servient tenement. The agreement restraining the owner of the petrol station from selling petroleum and oil products of competitors of Quest definitely constitutes the nature and content of a negative personal servitude. However, it was argued that the additional agreement that obliged the owners of the petrol station to exclusively sell petroleum products from Quest, fits the description of a positive personal trading servitude as discussed in chapter 3 part 3 3 and chapter 4 part 4 3. The nature of the aforementioned burden is positive because it requires the owner of the petrol station to solely sell Quest's products. Based on the aforementioned reasons, it is suggested that the content of the agreement in *Quest* should have been formulated as both a positive and negative personal trading servitude. If the court implemented the law correctly, a different result would have been reached. No formal requirements exist that would prohibit the recognition of such a servitude.

## 7 6 Alternative ways of structuring trade agreements

Chapter 6 focused on alternative ways of structuring trade agreements. The chapter looked at examples evident from existing case law where trading rights were not specifically designed as servitudes. The reason for discussing these alternative mechanisms, was to question whether it is necessary (and indeed favourable) to structure these agreements as servitudes even though the agreements comply with the establishment requirements for personal and praedial servitudes.

The first part of the chapter evaluated alternative mechanisms of regulating positive rights to trade on another individual's land. Case law in South Africa shows that it is possible to structure these agreements as either a lease agreement or an innominate contract. Whether the trading right will be categorised as a lease or innominate contract will depend on the *essentialia* of the specific contract. If a contract

[20] AJ van der Walt *The law of servitudes* (2016) 460.

does not comply with the *essentialia* of a specific traditional contract, it will be regarded as an innominate contract. The cases of *Kessler v Krogmann*,[21] *Nel v Abrahams and Sloot*[22] and *Botha and Another v Soocher*[23] serve as authority for the fact that the right to trade on another's property can be structured as an innominate contract. The legal consequences of such a contract is that it provides purely personal rights and it will only be enforceable against the landlord.

A second alternative mechanism for structuring a right to trade was examined, namely a lease agreement. A right to trade can be the subject matter of a lease agreement when it complies with the *essentialia* of such a contract. There should be agreement on the property that will be leased and the amount payable by the lessee should be determined or at least determinable. Like an innominate contract, a lease agreement usually creates a purely contractual obligation that is binding on the original parties to the contractual agreement. However, it was shown that a lease agreement could also provide proprietary protection. Various categories of lease agreements exist and the proprietary protection afforded to the lease agreement will be different in each category. In terms of a short-term lease agreement and an unregistered long-term lease agreement, the *huur gaat voor koop* rule provides proprietary protection. This principle ensures tenure security for tenants against the landlord and her successors in title for the entire duration of the lease agreement. However, the protection that is provided is only to a certain degree. This is because tenure security protection is dependent on a third party's knowledge of the contractual agreement. If the third party did not have knowledge, the agreement will only be enforceable for the period agreed to by the original landlord and the tenant. In the case of a short-term lease agreement, it will only be enforceable for the first 10 years. Registered long-term lease agreements in turn provide greater protection for a tenant because the right in this context becomes automatically elevated to the level of a limited real right that will be enforceable against all third parties. For purposes of this dissertation, the central question that had to be determined is whether it is necessary for trading rights to be structured specifically as a servitude or whether an alternative mechanism would suffice. After having evaluated all the possible legal constructs, it was argued that if the party secures her right to trade on another individual's land by means of a praedial servitude, personal servitude or a

[21] 1908 TS 290 297-298.
[22] 1911 TPD 24 28.
[23] 1941 TPD 245.

registered long-term lease agreement instead of a standard lease or innominate agreement, her rights will certainly be better protected because a limited real right is stronger than a personal right because it will be enforceable *erga omnes*.

The second part of the chapter evaluated another alternative mechanism for structuring a restraint of trade agreement. The section focused specifically on restrictive covenants as a legal instrument to regulate agreements in restraint of trade. Restrictive covenants were discussed as an alternative mechanism. The research question in this chapter focused on whether restrictive use covenants should be revived in South African law to regulate restraint of trade agreements. It was highlighted that the establishment requirements for a restrictive covenant are similar to the establishment requirements for a praedial servitude. Therefore, it was argued that it is not necessary for restrictive covenants to serve as the legal instrument to structure agreements in restraint of trade because a negative praedial trading servitude will serve the same purpose.

The chapter also assessed the nature of exclusive use covenants embedded in commercial lease agreements as a means to protect anchor tenants in shopping centers from competition. Exclusive use covenants are purely personal rights. However, these personal rights could be elevated to a real right (restrictive covenant) with third party effect if they comply with certain criteria, namely that the contracting parties should have the intention that the covenant should run with the land and a notice should exist of this restriction. *Winn-Dixie Stores Inc v Dolgencorp LLC*[24] serves as authority that in accordance with Florida's common law an exclusive use covenant embedded in a registered lease agreement could be elevated to a real covenant if the covenant specifically stipulates that the landlord and tenant had the intention that the covenant should run with land and if the co-tenant had notice of the restraint of trade agreement. In the South African context, the case of *Masstores (Pty) Ltd v Pick 'n Pay Retailers (Pty) Ltd*[25] is important in this regard. The court held that a servitude will be sufficient to protect an exclusive use covenant. Therefore, it was submitted that it is not necessary to revive restrictive covenants in the commercial lease context to regulate restraint of trade agreements.

[24] 746 F3d 1008 (11 Cir 2014).
[25] 2017 (1) SA 613 (CC).

This chapter also argues that legislation should be adopted to regulate exclusive use covenants embedded in commercial lease agreements. Exclusive use covenants are burdensome and should be regulated in a fair manner to ensure that the rights of all parties affected are equally balanced. The recommended legal framework should only recognise exclusive use covenants embedded in lease agreements as a negative personal servitude if it is fair, reasonable, and creates, or has the potential to create, economic benefits. In addition it should be registered as a limited real right in the title deed of the shopping center to ensure that third party co-tenants have notice of the burden placed on the shopping center. The recommended legal framework should also include factors that will guide courts to determine whether the specific covenant is fair and reasonable. Courts should look "to the purpose, geographic extent, and the duration of the restraint to determine"[26] whether the restraint is reasonable. Furthermore, the duration of the restraint of trade agreement should be short and reasonable enough to ensure that it is ultimately returned to free commercial use and that it does not last in perpetuity. Courts should also consider the anchor tenants' commitment to the local economy by taking into account whether the anchor tenant is capable of attracting customers to the shopping center and attracting lessees to rent space in the shopping center. In this regard the history of the anchor tenant's economic impact in other shopping centers should be evaluated. The damages caused by competition and the burden that will be created if the anchor tenant cannot institute direct legal action against a co-tenant who threatens to or engages in direct competition should also be taken into consideration. Inclusion of the aforementioned factors and guidelines into the South African legal framework will encourage courts to engage meaningfully with the law to enable them to achieve a just, fair and equitable outcome for all parties affected by the restraint of trade agreement.

## 7 7 Concluding remarks

This dissertation showed that novel trading servitudes such as the right to trade on someone else's property and the right to prohibit another from trading on their own land can be created in South African law, provided that the nature and content of these trading rights are in compliance with the anti-fragmentation strategies that are

[26] A comment to §3 6 *Restatement (Third) of Property: Servitudes*.

entrenched in the legal framework of South Africa. Trading servitudes are burdensome on land and the purpose of the legal framework set out in this dissertation is to prohibit the proliferation of burdens on land. Therefore, it is the primary duty of our courts to ensure that all the legal requirements are correctly applied when confronted with the question whether a trading servitude should be recognised in a particular context.

Trading servitudes are particularly burdensome because it creates an environment of anti-competitiveness. Nonetheless, trading servitudes are also very important in modern day commerce and therefore they cannot be regarded as unlawful simply due to anti-competitive concerns. As a result, this dissertation proposes the adoption of legislation to ensure that the rights of parties benefitting from, and affected by, trading agreements (especially in the context of negative trading servitudes) are equitably and fairly balanced. This newly proposed legislative framework entrenches refined regulatory guidelines that will prohibit such servitudes from lasting to perpetuity. It is hoped that the suggestions made in this dissertation will go a long way in ensuring greater clarity in this area of law.

## BIBLIOGRAPHY

**Akkermans B** *The principle of numerus clausus in European property law* (2008) Antwerpen/Groningen: Intersentia

**Akkermans B & Swadling W** "Types of property rights-immovables and movables (goods)" in Van Erp S & Akkermans B (eds) *Cases, materials and text on property law* (2012) Oxford: Hart Publishing 211-364

**Akkermans B, Sagaert V & Swadling W** "General issues: Setting the scene" in Van Erp S & Akkermans B (eds) *Cases, materials and text on property law. Ius commune casebooks for the common law of Europe* (2012) Oxford: Hart Publishing 37-95

**Alexander GS** *The global debate over constitutional property: Lessons for American takings jurisprudence* (2006) Chicago: University of Chicago Press

**Arndts L & Von Arnesberg R** *Lehrbuch der pandekten* (1886) Cotta: Stuttgart

**Arndts L** *Lehrbuch des Pandekten* 14 ed (1889) Cotta: Stuttgart

**Author Unknown** "Touch and concern, the Restatement (Third) of Property: Servitudes and a proposal" (2009) 122 *Harvard Law Review* 938-959

**Badenhorst PJ** "Registrability of real rights in the deeds office" (2000) 63 *Tydskrif vir Heedendaagse Romeins-Hollandse Reg* 499-509

**Badenhorst PJ, Pienaar JM & Mostert H** *Silberberg & Schoeman's The law of property* 5 ed (2006) Durban: LexisNexis Butterworths

**Badenhorst PJ & Coetser PPJ** "The subtraction from the *dominium* test revisited - *Pearly Beach Trust v Registrar of Deeds*" (1991) 24 *De Jure* 375-389

**Badenhorst PJ** "New real rights to land in South Africa: A twofold test" (2015) 4 *Property Law Review* 197-206

**Bamberger HG & Roth H** (eds) *Beck'scher Online-Kommentar* BGB 41 ed (2016) München: CH Beck

**Baum DC** "Lessor's covenants restricting competition" (1965) 2 *University of Illinois Law Forum* 228-252

**Baur JF & Stürner R** *Sachenrecht* 18 ed (2009) Munich: CH Beck

**Beekhuis JH** *C Asser Handleiding tot de beoefening van het Nederlandsch Burgerlijk Recht: Zakenrecht* 2e deel: artikels 625-876: Eigendom en Beperkte Zakelijke Genotsrechten 11 ed (1983) Zwolle: Tjeenk Willink

**Bevan C** "The doctrine of benefit and burden: Reforming the law of covenants and the *numerus clausus* problem" (2018) 77 *Cambridge Law Journal* 1-22

**Biondi B** *Istituzioni di diritto romano* (1956) Milaan: Dott A Giuffrè

**Boggenpoel ZT** "The law of property" 2018 (4) *Juta Quarterly Review*

**Bonfante P & Hamburger J** *Grondbeginselen van het Romeinsche Recht* (1919) Wolters: Groningen

**Brinz A** *Lehrbuch der Pandekten* (1884) Erlangen: Andreas Deichert

**Brits R** "Why the security right in section 118(3) of the Local Government: Municipal Systems Act 32 of 2000 is not enforceable against successors in title – a follow-up occasioned by the SCA's *Mitchell* judgment" (2017) 28 *Stellenbosch Law Review* 47-67

**Butler L & Klepper M** "Covenants not to compete in the real property context: An update" (1994) 53 *Popular Media* 35-40

**Christie RH & Bradfield GB** *Christie's the law of contract in South Africa* 6 ed (2011) LexisNexis: Durban

**Corbett MM** "Usufruct, *usus* and *habitatio*" in Hahlo HR (ed), Corbett MM, Hahlo HR, Hofmeyr G & Kahn E *The law of succession in South Africa* (1980) Cape Town, Wetton & Johannesburg: Juta 378-401

**Coetzee J** "Greater clarity needed on exclusive lease agreements in grocery retail sector" (06-07-2017) Commercial Property News http://www.bizcommunity.com/Article/196/567/164327.html (accessed 23-10-18)

**Cooper WE** *Landlord and tenant* 2 ed (1994) Cape Town: Juta

**Cujacius J** *Opera (ad Parisiesnem Fabrotianam Editionem)* (1839) Prati: F Giachetti

**Davis CJ** "The principle of benefit and burden" (1998) 57 *Cambridge Law Journal* 522-553

**De Beer C** *Butterworths business contracts compendium* (1997) Durban: LexisNexis Butterworths

**Delport HJ & Olivier NJJ** *Sakereg vonnisbundel* 2 ed (1985) Cape Town: Juta

**Dernburg H** *Pandekten* vol I (1892) Berlin: Müller

**Dernburg H** *Pandekten* 6 ed (1900) Berlin: Müller

**Depoorter BWF & Parisi F** "Fragmentation of property rights: A functional interpretation of the law of servitudes" (2003) 3 *Global Jurist Frontiers* 1-41

**De Waal MJ** *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* (1989) LLD dissertation Stellenbosch University

**De Waal MJ** "Die passiwiteitsvereiste by grondserwitute en die skepping van positiewe serwituutverpligtinge" 1991 *Tydskrif vir die Suid-Afrikaanse Reg* 233-249

**De Waal MJ** "*Perpetua causa* (permanente grondslag) as vestigingsvereiste vir grondserwitute" (1991) 54 *Tydskrif vir Heedendaagse Romeins-Hollandse Reg* 717-737

**De Waal MJ** "*Vicinitas* of nabuurskap as vestigingsvereiste vir grondserwitute" 1990 *Tydskrif vir die Suid-Afrikaanse Reg* 186-206

**De Waal MJ** "Servitudes" in Feenstra R & Zimmerman R (eds) *Das römisch-holländische recht: Fortschritte des Zivilrechts im 17 Und 18 Jahrundert* (1992) Berlin: Duncker and Humblot 567-595

**De Waal MJ** "Servitudes" in Zimmerman R & Visser D (eds) *Southern cross: Civil law and common law in South Africa* (1996) Cape Town: Juta 785-817

**De Waal MJ** "Identifying real rights in South African law" in Bartels S & Milo M (eds) *Contents of real rights* (2004) Nijmegen: Wolf Legal Publishers 83-98

**De Waal MJ** "Die moderne aanwending van grondserwitute: Eiendomsreg en die beheer oor die ontwikkeling van ander saaklike regte" 1995 *Tydskrif vir die Suid –Afrikaanse Reg* 193-220

**Delport HJ & Olivier NJJ** *Sakereg vonnisbundel* 2 ed (1985) Cape Town: Juta

**Dhliwayo P** *A constitutional analysis of access rights that limit landowners' right to exclude* (2015) unpublished LLD dissertation Stellenbosch University

**Di Robilant A** "Property: A bundle of sticks or a tree?" (2013) 66 *Vanderbilt Law Review* 869-932

**Elvers R** *Die römische Servitutenlehre* (1856) Marburg: Elwert'sche Universitäts-Buchhandlung

**Erasmus HJ, Van der Merwe CG & Van Wyk AH** *Lee RW & Honoré AM Family, things and succession* 2 ed (1983) Durban: Butterworths

**French S** "Can covenants not to sue, covenants against competition and spite covenants run with land? Company results under the touch or concern doctrine and the Restatement third, property (servitudes)" (2003) 38 *Real Property Probate & Trust Journal* 267-293

**French S** "Toward a modern law of servitudes: Reweaving the ancient strands" (1982) 55 *Southern California Law Review* 1261-1319

**Gordon WM & De Waal MJ** "Servitudes and real burdens" in Zimmerman R, Visser D & Reid KGC (eds) *Mixed legal systems in comparative perspective* (2004) Cape Town: Juta 735-756

**Glück CF** *Pandecten* vol x (1808) Erlangen: Palm & Enke

**Gray K & Gray SF** *Elements of land law* 5 ed (2009) Oxford: Oxford University Press

**Grobler L** *The salva rei substantia requirement in personal servitudes* (2015) LLD dissertation Stellenbosch University

**Groenewegen van der Made S** *Tractatus de legibus abrogatis et inusitatis in Hollandia vicinisque regionibus* (1649) Leiden: Lugduni-Batavorum

**Grotius H** *Inleidinge tot de Hollandsche reghts-geleertheid* (1619-1621) Dovring F, Fischer HFWD & Meijers EM (eds) (1952) Leiden: Universitaire Pers

**Grziwotz H, Keukenschrijver A & Ring G (eds)** *NomosKommentar BGB Sachenrecht* vol 3 § 854-1296 3 ed (2013) Baden-Baden: Nomos

**Hall CG** *Hall CG & Kellaway EA Servitudes* 3 ed (1973) Cape Town: Juta

**Hall CG (ed)** *AFS Maasdorp Maasdorp's Institutes of South African Law vol II: The law of property* 9 ed (1971) Cape Town: Juta

**Halper EB** "Supermarket use and exclusive clauses" (2001) 30 *Hofstra Law Review* 297-481

**Harpum C, Bridge S & Dixon M** *Megarry & Wade The law of real property* 7 ed (2008) London: Sweet & Maxwell

**Hedemann JW** *Sachenrecht des Bürgerlichen Gesetzbuches* 3 ed (1960) Berlin: W de Gruyter

**Heisterkamp AHT** "Beperkte regten op goederen" in Reehuis WHM & Heisterkamp AHT with Van Maanen GE & De Jong GT (eds) *Pitlo Het Nederlands burgerlijk recht* part 3 *Goederenrecht* 13 ed (2012) Deventer: Kluwer 437-514

**Hijmans IH** *Romeinsch Zakenrecht* (1926) Zwolle: Tjeenk Willink

**Horwitz MJ** *The transformation of American law 1870-1960: The crisis of legal orthodoxy* (1992) New York: Oxford University Press

**Hotard A** "Real rights of noncompetition: Louisiana public policy and the civil tradition" (2017) 77 *Louisiana Law Review* 1209-1248

**Huber U** *Hedendaegse rechts-geleertheyt, soo elders, als in Frieslandt gebruikelyk* (1768) Amsterdam: Gerrit de Groot en zoon en Petrus Schouten

**Hugo C & Simpson P** "Lease" in Zimmerman R, Visser D & Reid K (eds) *Mixed legal systems in comparative perspective property and obligations in Scotland and South Africa* (2004) Lansdowne: Juta 301-334

**Jörs P & Kunkel W** (ed) *Römisches privatrecht (Auf Grund des Werkes von Paul Jörs* (1949) Berlin Heidelberg: Springer-Verlag

**Kaser M** *Das römische Privatrecht* vol 1 2 ed (1971) München: Beck

**Kavanagh K (ed)** *South African concise Oxford dictionary* 10 ed (2009) Cape Town: Oxford University Press

**Kerr AJ & Glover G** "Lease" in Joubert WA & Faris JA (eds) *The law of South Africa* vol 14(2) (2010) Durban: Butterworths

**Kiewitz L** *Relocation of a specified servitude of right of way* (2010) unpublished LLM thesis Stellenbosch University

**Köhler J** "Beitrage zum Servitutenrecht" (1897) 87 *Archiv für die civilistische Praxis* 157-312

**Krüger P** *Institutiones Iustiniani* (1920) Berlin translated by P Birks & G McLeod *Justinian's Institutes* (1987) Ithaca, New York: Cornell University Press

**Lee RW** *An introduction to Roman-Dutch law* (1968) Oxford: Clarendon Press

**Lehman K** "Letting and hiring of property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) Cape Town: Juta 906-947

**Leos E** "*Quasi*-usufruct and shares: Some possible approaches" (2006) 123 *South African Law Journal* 126-146

**Lovett JA, Puder MG & Wilson EL** *Louisiana property law, The civil code, Cases and commentary* (2014) Durham, North-Carolina: Carolina Academic Press

**Lovett JA** "Title conditions restraint of trade" in Palmer VV & Reid EC (eds) *Mixed jurisdictions compared private law in Louisiana and Scotland Edinburgh Studies in Law Volume 6* (2006) Edinburgh: Edinburgh University Press Limited 30-66

**Maasdorp AFS rev CG Hall** (ed) *Maasdorp's Institutes of South African Law: vol II The law of property* 9 ed (1971) Cape Town: Juta

**Mackeldey F** *Lehrbuch des heutigen römischen Rects* 14 ed (1862-1863) Giessen: Geyer

**Mackenzie N** "Exclusive leases with anchor tenants in South Africa" (25-06-2014) Competition Chronicle <https://www.competitionchronicle.com/2014/06/exclusive-leases-with-anchor-tenants-in-south-africa/> (accessed 23-10-2018)

**Marsh TD & Szwarc S** "Transforming lease covenants into real covenants: Lessons from *Winn-Dixie v Dolgencorp*" (2015) 29 *Probate and Property Magazine* 35-56

**McBride AG** "The need for legislative authorization of noncompete servitudes in commercial leases" (2017) 61 *Loyola Law Review* 325-363

**Mcfarlane B, Hopkins N & Nield S** *Land law, text, cases and materials* 2 ed (2012) Oxford: Oxford University Press

**Merrill TW & Smith HE** "Optimal standardization in the law of property: The *numerus clausus* principle" (2000) 110 *Yale Law Journal* 1-70

**Mostert H & Pope A (eds), Badenhorst P, Freedman W, Pienaar J & Van Wyk J** *The principles of the law of property in South Africa* (2010) Cape Town: Oxford University Press

**Mostert H, Pienaar JM & Van Wyk J** "Limited real rights in land" in Joubert WA & Faris JA (eds) vol 14 part 1 *The law of South Africa* (2010) Durban: LexisNexis Butterworths

**Münchener Kommentar** *zum Bürgerlichen Gesetzbuch* Vol 6 (*Sachenrecht* - §§ 854-1296) 6 ed (2013) München

**Münchener Kommentar** zum *Bürgerlichen Gesetzbuch* Vol. 7 (*Sachenrecht* - §§ 854-1296) 7 ed (2017) München

**Mommsen T & Krüger P** *Digesta Iustiniani in Corpus iuris civilis* (1920) Berolina: apud Weidmannos

**Neels JL** "Erfdiensbaarhede: Nut vir heersende erf" 1988 *Tydskrif vir die Suid-Afrikaanse Reg* 527-541

**Neels JL** *Onderskeidende kenmerke by diensbaarhede* (1989) LLM dissertation Rand Afrikaans University

**Neels JL** "Naburigheid as vereiste vir erfdiensbaarhede" 1990 *Tydskrif vir die Suid-Afrikaanse Reg* 254-263

**Neels JL** "Ewigdurende oorsaak. Die *perpetua causa*-vereiste by erdiensbaarhede: Uitoefening van 'n saaklike serwituut afhanklik van 'n positiewe dadigheid deur die eienaar of gebruiker van die dienende erf" 2009 *Tydskrif vir die Suid-Afrikaanse Reg* 660-673

**Neels JL** "Ewigdurende oorsaak. Die *perpetua causa*-vereiste by erfdiensbaarhede: Behoefte van die heersende erf en geskiktheid van die dienende erf (deel 1)" 2010 *Tydskrif vir die Suid-Afrikaanse Reg* 73-85

**Neels JL** "Ewigdurende oorsaak. Die *perpetua causa*-vereiste by erfdiensbaarhede: Behoefte van die heersende erf en geskiktheid van die dienende erf (deel 2)" 2010 *Tydskrif vir die Suid-Afrikaanse Reg* 331-345

**Osakwe C** "Louisiana legal systems: A confluence of two legal traditions" (1986) 34 *American Journal of Comparative Law Supplement* 29-45

**Otto DU** "Dienstbarkeiten" in Grziwotz H, Keukenschrijver A & Ring G (eds) *NomosKommentar BGB Sachenrecht* vol 3 § 854-1296 3 ed (2013) Baden-Baden: Nomos 955-1181

**Perozzi S** "*Perpetua causa* nelle servit – Prediali Romane" 14 (1893) *Rivisita italiana per la scienze giurdiche* 175-257

**Puchta GF** *Pandekten* 11 ed (1872) Leipzig: Johann Ambrosius Barth

**Rabel E** *Grundzüge des römischen privatrechts* 2 ed (1955) Basel: Benno Schwabe

**Rank-Berenschot EB** "Beperkte genotsrechten" in Snijders HJ & Rank-Berenschot EB (eds) *Goederenrecht* 5 ed (2010) Deventer: Kluwer 509-572

**Reid KGC** *The abolition of feudal tenure in Scotland* (2003) Edinburgh: LexisNexis

**Reid KCG, Gretton GL & Barr AR** *Conveyancing 2014* (2015) Edinburgh: Avizandum Publishing

**Schets J** *Van het recht van de Zuid-Afrikaansche Republiek* (1897) Gent: Vanderpoorten

**Scholtens JE** "The law of property" in Hahlo HR & Kahn E *The union of South Africa: The development of its laws and constitutions* (1960) 571-621 600

**Schulz F** *Classical Roman law* (1951) Oxford: Clarendon

**Scott TJ** "*Cowley v Hahn* 1987 (1) SA 440 (EC)" (1987) 20 *De Jure* 181-185

**Scott J** "*Bhamjee v Mergold Beleggings (Edms) Bpk* 1983 (4) SA 555 (T) Persoonlike serwituut – aard van – oordraagbaarheid" (1984) 47 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 351-356

**Scott J** "Effect of the destruction of a dwelling on the personal servitude of habitation – *Kidson v Jimspeed Enterprises CC*" (2011) 74 *Tydskrif vir Heedendaagse Romeins-Hollandse Reg* 155-169

**Seuffert JA** *Praktisches Pandektenrecht* vol I 4 ed (1860) Würzburg: Stahel

**Sharrock R** *Business transactions law* 8 ed (2011) Cape Town: Juta

**Silberberg H & Schoeman J** (ed) *The law of property* 2 ed (1983) Durban: Butterworth

**Sutro S** *Leerboek der Instituten* (1878) Tiel: Campagne

**Soanes C & Stevenson A** (eds) *Concise Oxford English dictionary* 11 ed revised (2006) Oxford: Oxford University Press

**Sohm R** *The Institutes; A textbook of the history and system of Roman private law* 3 ed (1907) (translated by J Crawford Ledlie) Oxford: Clarendon

**Sonnekus JC** "Saaklike regte of vorderingsregte? – Tradisionele toetse en 'n *petitio principii*" 1991 *Tydskrif vir die Suid-Afrikaanse Reg* 173-180

**Sonnekus JC** "Verryking van die eienaar by nie-uitoefening van *habitatio* en versorgingsverpligtinge jeens eie ouer as bewoningsreghebbende" (2010) 5 *Stellenbosch Law Revie*w 26-44

**Sonnekus JC & Neels JL** *Sakereg vonnisbundel* 2 ed (1994) Durban: LexisNexis Butterworths

**Struycken THD** *De numerus clausus in het goederenrecht* (2007) Amsterdan: Kluwer

**Ter Heide J** *Kort begrip van Romeins recht* (1967) Amsterdam: Agon Elsevier

**Thisbaut AFJ** *System des Pandekten-Rechts* vol 2 (1809) Jena: Johann Michael Mauke

**Thomas JAC** *Textbook of Roman law* (1976) Amsterdam: North Holland

**Thompson MP** *Modern land law* 5 ed (2012) Oxford: Oxford University Press

**Trahan JR** *Louisiana law of property A Précis* (2012) New Providence & San Francisco: Matthew Bender & Company - LexisNexis

**Van der AA PJBC** *Inleiding tot de Hedendaagsche Hollandsche Rechts-geleerdheid en Praktijk* vol 2 (1810) Amsterdam: Gartman

**Van der Keessel DG** *Dictata ad Justiniani Institutionum Beinart B, Hijmans BL & Van Warmelo P* (eds) (1965) Asterdam: Balkema

**Van der Keessel DG** *Praelectiones juris hodierni ad Hugonis Grotii Introductionem ad jurisprudentiam Hollandicam* EM Meijers (ed) (1939) *ad Gr* 2 35 14 translated by CA Lorenz *Select theses on the law of Holland and Zeeland, being a commentary on Hugo Grotius Introduction to Dutch jurisprudence* 2 ed by J de Wal (1884) Cape Town: Juta

**Van der Linden J** *Rechtsgeleerd practicaal en koopmans handboek, ten dienste van regters, practizijns, kooplieden, en allen die een algemeen overzicht van regtskennis verlangen* (1806) Amsterdam: Johannes Allart

**Van der Merwe CG** "Die nutsvereiste by erfdiensbaarhede" in Joubert DJ (ed) *Petere Fontes: LC Steyn Gedenkbundel* (1980) Vereniging Hugo De Groot 163-176

**Van der Merwe CG** "Servitudes" in Erasmus HJ, Van der Merwe CG & Van Wyk AH (eds) *Lee and Honoré Family, things and succession* 2 ed (1983) Durban: Butterworths

**Van der Merwe CG** *Sakereg* 2 ed (1989) Durban: Butterworths

**Van der Merwe CG** "*Numerus clausus* and the development of new real rights in South Africa" (2002) 119 *South African Law Journal* 802-815

**Van der Merwe CG & Pope A** "The law of property, the concept of property and real rights" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) Cape Town: Juta 405-444

**Van der Merwe CG** "Servitudes and other real rights" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) Cape Town: Juta 591-629

**Van der Merwe CG** "Rights in land" in Joubert WA & Faris JA (eds) *The law of South Africa* vol 14 part 1 2 ed (2010) Durban: LexisNexis

**Van der Merwe CG** & **De Waal MJ** "Servitudes" in Joubert WA & Faris JA (eds) *The law of South Africa* vol 24 2 ed (2010) Durban: LexisNexis

**Van der Merwe CG** "Things, time, time-sharing and shareblocks" in Joubert WA, Faris JA & LTC Harms (eds) *The law of South Africa* vol 27 2 ed (2014) Durban: LexisNexis

**Van der Merwe CG & Pienaar JM** "The law of property" 2011 *Annual Survey of South African Law* 890-995

**Van der Merwe CG & Pienaar JM** "The law of property" 2016 *Annual Survey of South African Law* 885-886

**Van der Merwe CG** "Extinction of personal servitude of habitation – *Kidson v Jimspeed Enterprises CC*" (2010) 73 *Tydskrif vir Heedendaagse Romeins-Hollandse Reg* 657-665

**Van der Merwe CG** "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413.

**Van der Merwe CG & De Waal MJ** "Servitudes" in Joubert WA & Faris JA (eds) *The law of South Africa* vol 24 2ed (2010) Durban: LexisNexis Butterworths

**Van der Spuy P de W** "*Kruger v Gunter* 1995 (1) SA 334 (N) – Aard van 'n persoonlike serwituut" (1995) 28 *De Jure* 458-463

**Van der Walt AJ** "Saaklike regte en persoonlike serwitute" (1987) 50 *Tydskrif vir Heedendaagse Romeins-Hollandse Reg* 343-352

**Van der Walt AJ** *The law of servitudes* (2016) Cape Town: Juta

**Van der Walt AJ** "*Novel servitudes Liber Amicorum – Essays in honour of JC Sonnekus Sakereg*" 2017 *Tydskrif vir die Suid-Afrikaanse Reg* 408-420

**Van der Walt AJ** *Law of property casebook for students* 8 ed (2016) Cape Town: Juta

**Van der Walt AJ** "Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 170-203

**Van Erp S** "A *numerus quasi-clausus* of property rights as a constitutive element of future European property law?" in Boele-Woelki K, Brants CH & Steenhoff GJW (eds) *Het plezier van de rechtsvergelijking. Opstellen over unificatie en harmonisatie van het recht in Europa aangeboden aan prof mr EH Hondius* (2003) Deventer: Kluwer 39-52

**Van Leeuwen S** *Censura forensis theretico practica* (1662) Lugduni Batavorum: Ex officina Francisci Moyardi, & Petri Leffen

**Van Leeuwen S** *Het Rooms-Hollands regt* (1664) Leyden/Rotterdam: Anno Hackens

**Van Oven JC** *Leerboek van Romeinsch Privaatrecht* (1948) Leiden: Brill

**Van Wyk J** *Planning law* 2 ed (2012) Cape Town: Juta

**Vinnius A** *Institutionum Immperialum Commentarius* (1726) Lugduni Batavorum: Apud Joannem van der Linden Juniorem

**Voet J** 1647-1713 *Commentarius ad Pandectas* translated by Gane P *Commentary on the Pandect* (1955-1958) Durban: Butterworths

**Von Bar C** *Sachenrecht* Vol 1 (*Grundlagen, Gegenstände sachenrechtlichen Rechtsschutzes, Arten und Erscheinungsformen subjektiver Sachenrechte*) (2015) München: CH Beck

**Von Staudinger J** *Kommentar zum Bürgerlichen Gesetzbuch* Buch 3: *Sachenrecht* (§§ 1018-1112), revised edition (2016) Berlin: De Gruyter

**Von Vangerow KA** *Lehrbuch der Pandekten* vol I 7 ed (1865) Marburg and Leipzig

**Watson A** (ed) *The Digest of Justinian* (1985) Philadelphia, PA: University of Pennsylvania Press

**Wendt O** *Lehrbuch der Pandekten* (1888) Jena: Gustav Fischer

**HR Williams** "Restrictions on the use of land: Covenants running with the land at law" (1949) 27 *Texas Law Review* 419-453

**Wilhelm J** *Sachenrecht* 4 ed (2010) Berlin: De Gruyter

**Windscheid B** *Lehrbuch des Pandektenrechts* (1900) Frankfurt: Rutten & Loening

**Wolf M** "Marketability contra freedom of parties in the law of land burdens" in S van Erp & B Akkermans (eds) *Towards a unified system of land burdens?* vol 59 (2006) Oxford: Intersentia Antwerpen 11-16

**Ziff B & Jiang K** "Scorched earth: The use of restrictive covenants to stifle competition" (2012) 30 *Windsor Year Book of Access to Justice* 79-101

**Yiannopoulous AN** *Louisiana civil law treatise: Praedial servitudes* vol 4 (2015) Eagan MN: Thomson Reuters

## CASE LAW

### South Africa

#### A

*Aberdeen Municipality v Aberdeen Dutch Reformed Church* (1905) 22 SC 474

*Administrator (Transvaal) v Industrial Timber Co* 1932 AD 33

*Alexander v Johns* 1912 AD 437

*Antje Komen v Hendrik de Heer* (1908) 29 NLR 237

*Arend v Estate Nakiba* 1927 CPD 8 10

*Armstrong v Bhamjee* 1991 (3) SA 195 (A) 201

#### B

*Badenhorst v Joubert* and *Others* 1920 TPD 100

*Baehnisch v Estate Odendaal* (1909) 26 SC 152

*Barclays Western Bank Ltd v Comfy Hotels Ltd* 1980 (4) SA 174 (E)

*Barnett v Rudman* 1934 AD 203

*Bedford Square Properties (Pty) Ltd v Erf 179 Bedfordview (Pty)* Ltd 2011 (5) SA 306 (SCA)

*Bhamjee en 'n Ander v Mergold Beleggings (Edms) Bpk* 1983 (4) SA 555 (T)

*Bisschop v Stafford* 1974 (3) SA 1 (A)

*Boshoff v Theron* 1940 TPD 299

*Briers v Wilson and Others* 1952 (3) SA 423 (C)

*Brink v Van Niekerk* 1986 (3) SA 428 (T)

*Brunsdon's Estate v Brunsdon's Estate* 1920 CPD 159

#### C

*Cape Explosive Works Ltd v Denel (Pty) Ltd and Others* 2001 (3) SA 569 (SCA)

*City Deep v McCalgan* 1924 WLD 276

*Coetzee v Malan* 1979 1 SA 377 (O)

*Consistory of Steytlerville v Bosman* (1893) 10 SC

*Cooper v Boyes NO* 1994 (4) SA 521 (C)

*Cowin NO and Others v Kyalami Estate Homeowners Association and Others* SGHC case no 12/11377, 25 February 2013

*Cowley v Hahn* 1987 (1) SA 440 (E)

**D**

*De Klerk v Niehaus* (1897) 14 SC 302

*De Kock v Hänel and Others* 1999 (1) SA 994 (C)

*Denel (Pty) Ltd v Cape Explosive Works Ltd and Another* 1999 (2) SA 419 (T)

*De Smidt v Burton Master of the Supreme Court* (1841) 1 M 222

*Dhayanundh v Narain* 1983 (1) SA 565 (N)

*Double Diamond Properties LLC v Amoco Oil Co* 487 F Supp 2d 737 (E D va 2007)

*Dreyer v Letterstedt's Executors* 1865 5 Searle 88

*Dreyer v Ireland* (1874) 4 Buch 193

**E**

*Eksteen v Pienaar* 1969 (1) SA 17 (O)

*Engelbrecht v Brits* 1906 TS 274

*Estate Ishmail v Sayed* 1965 (1) SA 393 (C)

*Ex parte Geldenhuys* 1926 OPD 155

*Ex parte Jerrard* 1934 WLD 87

*Ex parte Steinberg* 1940 CPD 1

**F**

*Felix en 'n Ander v Nortier NO en Andere* [1996] 3 All SA 143 (SE)

*Fine Wool Products of SA Ltd & Another v Director of Valuations* 1950 (4) SA 490 (EC)

*Fison Albatros Fertilizers Ltd v Salisbury Municipality* 1931 SR

*Fourie v Marandellas Town Council* 1972 (2) SA 698 (R)

**G**

*Galant v Mahonga* 1922 EDL

*Geldenhuys v Commissioner for Inland Revenue* 1947 (3) SA 256 (C) 262

*Gibaud v Bagshaw* 1918 CPD 202

*Goliath v Estate Goliath* 1937 CPD 312

**H**

*Hawkins v Munnik* (1830) 1 Menz 465

*Heidelberg Municipality v Uys* (1898) 15 SC 156

*Hollins v Registrar of Deeds* 1904 TS 603

*Hollmann and Another v Estate Latre* 1970 (3) SA 638 (A)
*Hotel De Aar v Jonordon Investment (Edms) Bpk* 1972 (2) SA 400 (A)
*Houghton Estate Co vs FS McHattie & WS Barrat* (1894) 1 OR 92

**I**

*In re Bennett and Green and the Bank of Africa Ltd* (1901) 22 NLR 404
*Ismail v Ismail* 2007 (4) SA 557 (EC)

**J**

*Janse van Rensburg v Koekemoer* 2011 (1) SA 118 (GSJ)
*Jansen v Fincham* (1892) 9 SC 289
*Johannesburg Municipality v Transvaal Cold Storage Ltd* 1904 TS 722
*Jordaan and Others v Tshwane Metropolitan Municipality and Others* 2017 (6) SA 287 (CC)

**K**

*Kempenaars v Jonker, Van der Berg and Havenga* (1898) 5 OR 223
*Kessler v Krogmann* 1908 TS 291
*Kidson v Jimspeed Enterprises CC* 2009 (5) SA 246 (GNP)
*Kruger v Gunter* 1995 (1) SA 344 (N)

**L**

*Landman V Daverin* (1881) 2 EDC 1 7
*Laubscher v Reve* (1866) 1 Roscoe 408
*Letsitele Stores (Pty) Ltd v Roets and Others* 1958 (2) SA 224 (T)
*Lorentz v Melle and Others* 1978 (3) SA 1044 (T)
*Louw v Van der Post* (1894) 11 CLJ 151 (O)

**M**

*Magna Alloys and Research (SA) (Pty) Ltd v Elllis* 1984 (4) SA 874 (A)
*Masstores (Pty) Ltd v Pick 'n Pay Retailers (Pty) Ltd and Another* 2016 (2) SA 586 (SCA)
*Masstores (Pty) Ltd v Pick 'n Pay Retailers (Pty) Ltd* 2017 (1) SA 613 (CC)
*Mergold Beleggings (Edms) Bpk v Bhamjee en 'n Ander* 1983 (1) SA 663 (T)
*Mocke v Beaufort West Municipality* 1939 CPD 135

*Morkel v Malan* 1933 CPD 370 374

**N**

*National Stadium SA (Pty) Ltd and Others v Firstrand Bank Ltd* 2011 (2) SA 157 (SCA)

*Nel v Abrahams & Sloot* 1911 TPD 2

*Nel v Commissioner for Inland Revenue* 1960 (1) SA 227 (A)

*Nel v Potgieter* 1962 (2) SA 608 (T)

**O**

*Oosthuizen v Plessis* (1887) 5 SC 69

*Oosthuizen v Standard Credit Corporation Ltd* 1993 (3) SA 891 (A)

**P**

*Pearly Beach Trust v Registrar of Deeds* 1990 (4) SA 614 (C)

*Penny v Brentwood Gardens Body Corporate* 1983 (1) SA 487 (C)

*Pick 'n Pay Retailers (Pty) Ltd v Masstores (Pty) Ltd* unreported decision (46501/2014) [2014] ZAGPPHC 769 (26 September 2014)

*Potgieter and Another v Minty and Sons and Additional Magistrate Barberton* 1929 TPD 745

**Q**

*Quest Petroleum (Pty) Ltd v Walters and Another* unreported decision (16225/2017) [2018] ZAWCHC 163 (9 November 2018)

**R**

*R v Thompson* 1933 EDL 343

**S**

*Schwedhelm v Hauman* 1947 (1) SA 127 (E)

*South African Railways and Harbours v Paarl Rollller Flour Mills Ltd* 1921 CPD 62

*Stuart v Grant* (1903) 24 NLR 416

**T**

*Tonkin v Van Heerden* 1935 NPD 589

**U**

*Union Government (Minister of Finance) v De Kock* 1918 AD 22

**V**

*Van der Mewe v Wiese* 1948 (4) SA 8 (C)
*Van der Vlugt v Salvation Army Property Co* 1932 CPD 56
*Van Rensburg and Another v Koekemoer and Others* 2011 (1) SA 118 (GSJ)
*Van Vuren and Others v Registrar of Deeds* 1907 TS 289
*Venter v Minister of Railways* 1949 (2) SA 178 (EC)
*Volschenk v Van den Berg* 1917 TPD 321

**W**

*Webb v Beaver Investments (Pty) Ltd and Another* 1954 (1) SA 13 (T)
*Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1913 AD 267
*Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1918 AD 1
*Willow Waters Homeowners Association (Pty) Ltd v Koka NO and Others* 2015 (5) SA 304 (SCA)
*Wolvaardt v Pienaar* (1884) 1 SAR 162

**Y**

*Young v Smith* 1961 (3) SA 793 (T)

**England**

*Calvin's case* (1608) 77 ER 397

**Florida**

*Caulk v Orange Cnty* 661 So 2d 932, 933-934 (Fla Dist Ct App 1995)
*Double Diamond Properties LLC v Amoco Oil Co* 487 F Supp 2d 737 (E D va 2007)

*Soho Serve Corp v Westowne Ass'n* 929 F 2d 160 (5 Cir 1991)

*Textron Fin Corp v Retif Oil & Fuel LLC* 342 F App x 29 33 (5 Cir 2009)

*Winn-Dixie Stores Inc v Dolgencorp LLC* No 11-80641 (SD Fla Jan 18 2012)

**Germany**

BGH 6 July 1939 161 Entscheidungen des reichsgerichts in zivilsachen (RGZ) 90 1939 (Ger)

BGH 25 February 1959, V ZR 224/87

BGH 24 September 1982, V ZR 96/81

BGH 3 February 1989, V ZR 224/87

NJW 1983 S 115 (116)

NJW 1989, 1607

OLG Bavaria, 17 January 1990, BReg 2 Z 122/89, DNotz 1991, 257

**Indiana**

*Tippecanoe Associates II v Kimco Lafayette* 671 Inc 811 N E 2d 438 (Ind Ct App 2004)

**Louisiana**

*Leonard v Lavigne* 162 So 2d 343 (La 1964)

*Meadowcrest Ctr v Tenet Health Sys Hosps Inc* 902 So 2d 512 514 (La Ct App 2005)

*Palomeque v Prudhomme* 664 So 2d 88 93 (La 1995)

*RCC Properties LLC v Wenstar Properties LP* 930 So 2d 1233 (La App 2 Cir 2006)

*R & K Bluebonnet Inc v Patout's of Baton Rouge Inc* 521 So 2d 634 635 (La Ct App 1988)

*SPE FO Holdings LLC v Retif Oil & Fuel LLC* No 07-3779 2008 WL754716 1 (ED La Mar 19 2008)

*Winn-Dixie Stores v Dolgencorp* LLC 746 F 3d 1008 (11 Cir 2014)

**Massachusetts**

*Whitinsville Plaza Inc v Kotseas* 390 NE 2d 243 (Mass 1979)

**New Jersey**

*Davidson Bros Inc v D Katz & Sons Inc* 579 A 2d 288 (NJ 1990)

**United Kingdom**

*Dyce v Lady Hay* (1852) 1 Macq 305

*Hill of Rubislaw (Q Seven) Ltd v Rubislaw Quarry Aberdeen Ltd* (2014) CSIH 105

*Keppell v Bailey* (1834) 2 My & K 517

*Re Ellenborough Park* (1956) Ch

*Russel Properties (Europe) Ltd v Dundas Heritable Ltd* (2012) CSOH 17

*Tulk v Moxhay* (1848) 2 Ph 774, 41 ER 1143

## LEGISLATION AND CODES

### South Africa

Administration of Estates Act 24 of 1913

Alienation of Land Act 68 of 1981

Constitution of the Republic of South Africa, 1996

Consumer Protection Act 68 of 2008

Deeds Registries Act 47 of 1937

General Law Amendment Act 62 of 1973

Mineral and Petroleum Resources Development Act 28 of 2002

Petroleum Products Act 120 of 1927

Prescription Act 68 of 1969

Subdivision of Agricultural Land Act 70 of 1970

### Belgium

*Burgerlijk Wetboek* 1900

### Dutch

*Burgerlijk Wetboek* 1992

### France

*Code civil* 1811

### Germany

*Burgerliches Gezetzbuch* 1900

### Louisiana

Louisiana Civil Code (1977) (United States of America)

Louisiana Revised Statute (2017)

Montana Code Annotated (2017)

*Restatement (Third) of Property: Servitudes* (2000)

Texas Business and Commerce Code Annotation (West 2015)